

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. [REDACTED] 1926

No. [REDACTED] 180

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, ET AL., ETC., APPELLANTS,

vs.

*Howard Sutherland*  
~~FREDERICK C. HICKS~~, AS ALIEN PROPERTY CUSTODIAN  
OF THE UNITED STATES; FRANK WHITE, AS TREAS-  
URER OF THE UNITED STATES, AND THE WIENER  
BANK-VEREIN OF VIENNA, AUSTRIA

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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FILED JULY 24, 1926

(31,351)



(31.351)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 628

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, ET AL., ETC., APPELLANTS,

vs.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN  
OF THE UNITED STATES; FRANK WHITE, AS TREAS-  
URER OF THE UNITED STATES, AND THE WIENER  
BANK-VEREIN OF VIENNA, AUSTRIA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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## Equity Subpoena.

1

*The President of the United States of America,  
to Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein, of Vienna, Austria,* GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars (\$250).

2

WITNESS, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 28th day of February in the year One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-sixth.

3

ALEX. GILCHRIST, JR.,  
Clerk.

STOCKTON & STOCKTON,  
Plaintiffs' Sol'rs.

*Equity Subpoena.*

4     The defendants are required to file their answer  
or other defense in the above cause in the Clerk's  
Office of this Court on or before the twentieth  
day after service hereof excluding the day of  
said service; otherwise the bill aforesaid may  
be taken *pro confesso*.

ALEX. GILCHRIST, JR.,  
Clerk.

(Seal.)

5

6

## Order for Service by Publication.

7

At a stated term of the United States District Court, held in and for the Southern District of New York, at the United States Courthouse in said district, on the 17th day of March, 1922.

Present—Honorable JULIAN W. MACK, *Circuit Judge*.

In Equity E. 23—160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

9

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Upon motion of the above named plaintiffs by their solicitors, Stockton & Stockton, and pursuant to Section 9 of the Trading with the Enemy Act, and Section 57 of the Judicial Code, and it appearing to the Court from the affidavit of Hamilton Vreeland, Jr., one of the solicitors for the plaintiffs, duly sworn to the 16th day of March, 1922, and submitted herewith, and from the original subpoena filed herein, that the

*Order for Service by Publication.*

- 10 Marshal of this court has duly returned the original subpoena issued in this suit with the following notation thereon:

"I hereby certify that after due and diligent search I am unable to find the within named defendants, Thomas W. Miller as Alien Property Custodian of U. S., Frank White as Treasurer of the United States and the Wiener Bank-Verein of Vienna, Austria, within the Southern District of New York.

- 11 WM. C. HECHT,  
U. S. Marshall,  
S. D. N. Y.

Dated, New York, March 1, 1922."

and that the defendant, the Wiener Bank-Verein of Vienna, Austria, is a foreign corporation and a non-resident alien and an "enemy," as defined by said Trading with the Enemy Act, personal service of the subpoena upon which defendant is not practicable, and which has not voluntarily appeared herein, it is,

- 12 ORDERED that the said defendant, the Wiener-Bank-Verein of Vienna, Austria, answer or otherwise move on or before the first day of June, 1922, as to the bill of complaint filed in the above entitled suit, or in default thereof that the Court will proceed to the hearing and adjudication of said suit; that this order be published in a newspaper of general circulation to wit: New York Evening Post once a week for six successive weeks, commencing on March 23, 1922, and that a copy of this order, together with a

*Affidavit of Hamilton Vreeland, Jr.*

copy of the bill of complaint filed herein, both 13  
 duly certified as such by the Clerk of this court,  
 be sent by registered mail to said defendant, the  
 Wiener Bank-Verein at Vienna, Austria, on or  
 before March 23, 1922.

A. G. Jr.

J. W. MACK,  
 U. S. C. J.

**Affidavit of Hamilton Vreeland, Jr.**

UNITED STATES DISTRICT COURT, 14  
 FOR THE SOUTHERN DISTRICT OF NEW YORK.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
 H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
 MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
 STEIN, co-partners doing business under the  
 firm name and style of Zimmermann & For-  
 shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
 of the United States, and FRANK WHITE, 15  
 as Treasurer of the United States, and the  
 WIENER BANK-VEREIN, of Vienna, Austria,  
 Defendants.

State of New York,  
 County of New York—ss.:

HAMILTON VREELAND, JR., being duly sworn  
 says:

That he is a member of the firm of Stockton &

*Affidavit of Hamilton Vreeland, Jr.*

- 16 Stockton, the solicitors for the plaintiffs in the above entitled suit; that this action is brought to recover in United States Dollars, at the prevailing rate of exchange in the United States in or about the month of March, 1917, and from the property taken over by the Alien Property Custodian as belonging to the defendant the Wiener Bank-Verein, monies deposited with said defendant by plaintiffs and owing to plaintiffs by defendant; that on February 28th, 1922, he filed with the Clerk of the United States District Court for the Southern District of New York, the
- 17 original bill of complaint herein, thereupon obtaining from said Clerk a subpoena directing the above named defendants to appear before this Court to answer the bill of complaint herein; that on said February 28th 1922, he delivered to the United States Marshal for the Southern District of New York, the said subpoena to be served upon the above named defendants, and that said subpoena was returned by said Marshal with the following notation:

- 18 "I hereby certify that after due and diligent search I am unable to find the within named defendants, Thomas W. Miller as Alien Property Custodian of U. S., Frank White as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, within the Southern District of New York.

WM. C. HECHT,  
U. S. Marshal,  
S. D. N. Y.

Dated, New York, March 1, 1922."

*Affidavit of Hamilton Vreeland, Jr.*

Deponent further states that he has been unable to discover within this district, any office of the defendant, the Wiener Bank-Verein, and that he is informed and believes that said defendant, the Wiener Bank-Verein is a foreign corporation organized under the laws of the former Empire of Austria-Hungary or the present Republic of Austria and is not doing business within this district. The sources of his information and the grounds of his belief are numerous letters and documents from said defendant to the plaintiffs herein, and conversations which deponent has had with various of plaintiffs who are familiar with said defendant and its operation in this country.

Deponent therefore prays that an order in form attached hereto be granted by this Honorable Court directing said defendant, the Wiener Bank-Verein to answer or otherwise move as to the Bill of Complaint filed in the above entitled suit.

(Sd.) HAMILTON VREELAND, JR.

Sworn to before me this  
16th day of March, 1922.

RITA OHLSEN,

Notary Public,

Kings Co. No. 117.

Certificate filed Kings Co., Reg. Office No. 3060.

Certificate filed New York County No. 165.

Certificate filed N. Y. Register, No. 3127.

Commission expires March 30th, 1923.

(Seal)

### Copy of Order as Published.

22

(N. Y. Eve. Post, Mar. 23, 1922.)

AT A STATED TERM OF THE UNITED STATES DISTRICT COURT, held in and for the Southern District of New York, at the United States Courthouse in said district, on the 17th day of March, 1922.

Present: HONORABLE JULIAN W. MACK, Circuit Judge.

23

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of ZIMMERMANN and FORSHAY, as brokers, Plaintiffs, against THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria, Defendants.—In Equity.—E. 23-160.

24

Upon motion of the above named plaintiffs by their solicitors, Stockton & Stockton, and pursuant to Section 9 of the Trading with the Enemy Act, and Section 57 of the Judicial Code, and it appearing to the court from the affidavit of Hamilton Vreeland, Jr., one of the solicitors for the plaintiffs, duly sworn to the 16th day of March, 1922, and submitted herewith, and from the original subpoena filed herein, that the Marshal of this court has duly returned the original subpoena issued in this suit with the following notation thereon:

"I hereby certify that after due and diligent search I am unable to find the within named



*Copy of Order as Published.*

defendants, Thomas W. Miller as Alien Prop- 25  
erty Custodian of U. S., Frank White as Treas-  
urer of the United States and the Wiener Bank-  
Verein of Vienna, Austria, within the Southern  
District of New York.

“WM C. HECHT,  
“U. S. Marshal, S. D. N. Y.

“Dated, New York, March 1, 1922.”

and that the defendant, the Wiener Bank-Verein  
of Vienna, Austria, is a foreign corporation and  
a non-resident alien and an “enemy,” as defined 26  
by said Trading with the Enemy Act, personal  
service of the subpoena upon which defendant is  
not practicable, and which has not voluntarily  
appeared herein, it is

ORDERED that the said defendant, the Wiener  
Bank-Verein of Vienna, Austria, answer or other-  
wise move on or before the first day of June,  
1922, as to the bill of complaint filed in the  
above entitled suit, or in default thereof that the  
court will proceed to the hearing and adjudica-  
tion of said suit; that this order be published 27  
in a newspaper of general circulation to wit: New  
York Evening Post, once a week for six succes-  
sive weeks, commencing on March 23, 1922, and  
that a copy of this order, together with a copy  
of the bill of complaint filed herein, both duly  
certified as such by the Clerk of this court, be  
sent by Registered mail to said defendant, the  
Wiener Bank-Verein at Vienna, Austria, on or

J. W. MACK, U. S. C. J.  
before March 23, 1922.

*Affidavit of Publishing of A. McMillan.*

28 State of New York,  
City and County of New York—ss.:

A. McMILLAN, being duly sworn, says that he is the Principal Clerk of the Publisher of "The Evening Post," a daily newspaper printed and published in the City and County of New York; that the notice hereto annexed has been regularly published in said "The Evening Post" once a week for six successive weeks commencing on the 23rd day of March, 1922.

29 (Sd.) A. McMILLAN.

Sworn to before me this  
27th day of April, 1922.

(Sd.) JAMES W. JENNINGS,  
Notary Public,  
New York County.

Clerk's No. 51; Register's No. 3041.

Certificate filed in Counties of Kings Co. Clerk's  
No. 11; Reg. No. 3054.

Bronx Co. Clerk's No. 4; Reg. No. 9.

Commission expires March 30, 1923.

30 (Seal)

(Filed May 1, 1922.)

**Affidavit of Mailing of Edward R.  
Whittingham.**

31

**UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.**

---

**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,**

**Plaintiffs,**

32

**—against—**

**THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.**

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**United States of America,  
Southern District of New York,  
County and State of New York—ss.:**

**EDWARD R. WHITTINGHAM, being duly sworn,**  
says that he is an attorney-at-law in the office and  
employ of Stockton & Stockton, the solicitors for  
the above named plaintiffs; that he is over the  
age of 21 years and resides at No. 39 East Tenth  
Street in the City of New York; that pursuant  
to an order of Mr. Justice Mack dated the 17th  
day of March, 1922, and filed herein, he sent by  
registered mail on the 21st day of March, 1922,  
a copy of said order, together with a copy of the  
bill of complaint filed herein on the 28th day of  
February, 1922, both duly certified as such by the

33

*Affidavit of Mailing of Edward R. Whittingham.*

- 34 Clerk of this Court, to the defendant the Wiener Bank-Verein of Vienna, Austria, by depositing said certified copies in the United States mail at the branch post office known as "City Hall Station" Broadway and Park Row, Borough of Manhattan, City of New York, the same being one of the regularly maintained branch post offices of the United States, registered and enclosed in a securely sealed and closed wrapper, with postage thereon prepaid, addressed to said defendant the Wiener Bank-Verein at Vienna, Austria, that being the address designated in said order.

35

EDWARD R. WHITTINGHAM.

Sworn to before me this  
22nd day of March, 1922.

RITA OHLSEN,  
Notary Public,  
Kings Co. No. 117.

Certificate filed Kings Co. Register's Office No.  
3060.

Certificate filed New York County No. 165.

Certificate filed N. Y. Register, No. 3127.

36

Commission expires March 30th, 1923.

## Bill of Complaint.

37

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,

Plaintiffs,

38

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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The plaintiffs above named respectfully show  
to the Court and allege:

1. That at all times hereinafter mentioned, the  
plaintiffs herein were, and now are, co-partners  
doing business in the City of New York within  
the Southern District of New York, under the  
firm name and style of Zimmermann & Forshay,  
as brokers; that the plaintiffs were at all times  
hereinafter mentioned, and still are, residents and  
citizens of the State of New York; that all of said  
plaintiffs reside within the Southern District of  
New York, except plaintiffs David Forshay and  
John S. Scully, and that said David Forshay and  
John S. Scully each reside within the Eastern

39

*Bill of Complaint.*

40 District of New York; and that all said plaintiffs are now and at all times hereinafter mentioned were citizens of the United States of America, and are more than twenty-one years of age.

2. That the defendant, Thomas W. Miller, is now, and since in or about March, 1921, has been the duly appointed, qualified and acting Alien Property Custodian of the United States; that the defendant, Frank White, is now and since in or about March, 1921, has been the duly appointed, qualified and acting Treasurer of the United States; and that the defendant the Wiener Bank-Verein of Vienna, Austria, is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the former Empire of Austria-Hungary and/or the present Republic of Austria.

3. That this is a suit in equity brought under the provisions of the Trading with the Enemy Act, approved October 6, 1917, and the amendments thereto, and that this Honorable Court has jurisdiction of this suit by reason of said act.

42 4. That at the time of the commencement of this suit eighteen months had not elapsed after the "end of the war" as defined in said act.

5. That heretofore certain property was conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian, or seized by him and held by him or by the then Treasurer of the United States on the ground that it was the property of the Wiener Bank-Verein of Vienna, in the Empire of Austria-Hungary or the Republic of Austria, and on the further ground that the

*Bill of Complaint.*

said Wiener Bank-Verein of Vienna was an "enemy" or "ally of enemy" within the meaning of the terms as defined in said Trading with the Enemy Act and the amendments thereto; that since the time aforesaid all of said property, or the proceeds of the sale of all or any part thereof, has remained in the possession, custody, or control of the Alien Property Custodian and/or the Treasurer of the United States; that all of said property, or the proceeds of the sale of all or any part thereof, is now in the possession, custody or control of the above named defendant, the Alien Property Custodian and the Treasurer of the United States or each or either of them; and that the Alien Property Custodian and/or the Treasurer of the United States have received various sums of money as income from said property or from the proceeds of the sale of all or any part thereof.

6. That at no time since April 6, 1917, has any of plaintiffs been resident within the territory, including that occupied by the military and naval forces, of any nation with which the United States was at war, or of any nation which was an ally of a nation with which the United States was at war, or been resident outside the United States and doing business within such territory, or been an officer, official, agent, or agency of any such enemy or ally of enemy nation.

7. That none of plaintiffs is now or ever has been an "enemy" or "ally of enemy" within the meaning of the terms as defined by said Trading with the Enemy Act and the amendments thereto and the Proclamations of the President of the United States issued in pursuance thereof.

*Bill of Complaint.*

- 46 8. That said defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely on or about April 6, 1917, had in its possession the sum of Three million three hundred thirteen thousand seven hundred ninety-nine & 03/100 kronen (3,313,799.03 kronen), which it held for the use and benefit of plaintiffs and in which the defendant, the Wiener Bank-Verein of Vienna, then had and now has no right, title or interest; that said sum of money was due and owing to plaintiffs from the defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely
- 47 on April 6, 1917, and is now due and owing to said plaintiffs, at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.80 cents in United States currency for each Austrian krone, namely Three hundred ninety-one thousand twenty-eight dollars and Twenty-nine cents (\$391,028.29), which said sum the defendant, the Wiener Bank-Verein of Vienna, retains and, although demanded, refuses to pay.
- 48 9. That on or about the 15th day of December, 1921, and subsequent to said seizure or taking over by the Alien Property Custodian of said property, plaintiffs duly filed with the Alien Property Custodian a notice of their claim on said debt under oath and in such form and containing such particulars as the said Custodian required, and have not filed an application to the President of the United States for the allowance of said claim, all in pursuance of the provisions of the Trading with the Enemy Act and the amendments thereto.



*Bill of Complaint.*

10. That said property is subject to the jurisdiction of this Court and to any decree or judgment which may be rendered herein. 49

WHEREFORE your plaintiffs pray that the above mentioned defendants and each or any of them be directed and ordered to pay to the plaintiffs the sum of Three hundred ninety-one thousand twenty-eight dollars and Twenty-nine cents (\$391,028.29) with interest thereon at the rate of six per centum per annum from the 6th day of April, 1917, out of the property conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or seized by him and held by him or by the then Treasurer of the United States as aforesaid and now in the possession, custody or control of the above named defendants, the Alien Property Custodian and the Treasurer of the United States or each or either of them as aforesaid, or out of the proceeds of the sale of any or all of said property, or out of any increase, income, interest, dividends, coupons, or profits, which shall have accrued or arisen from or upon said property or said proceeds of sale up to the time of said payment to the plaintiffs, and that your plaintiffs have such other and further relief as to the Court may seem just and proper. 50 51

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs,  
Office and Post Office Address,  
2 Rector Street,  
Borough of Manhattan,  
City of New York.

*Bill of Complaint.*

52

State of New York,  
County of New York—ss.:

MARYAN H. HAUSER, being duly sworn says:

53

That he is a member of the firm of Zimmermann & Forshay, the plaintiffs in the foregoing Bill of Complaint; that the plaintiffs are co-partners pleading together and that he is authorized to make verification on behalf of his co-partners as well as on behalf of himself; and that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

MARYAN H. HAUSER.

Sworn to before me this  
10th day of February, 1922.

ELIAS GOLDSCHMIDT,  
Notary Public.

54

Bronx County Clerk's No. 59.  
Bronx County Register's No. 59.  
New York County Clerk's No. 255.  
New York County Reg. No. 3234.  
Commission expires March 30, 1923.

# **Stipulation Amending Complaint.**

55

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

56

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the Bill of Complaint herein be and the same hereby is amended:

1. By the insertion of the following paragraph in place of paragraph 8 of the original Bill of Complaint.

57

"8. That said defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely on or about April 6, 1917, was indebted to the plaintiffs in the sum of Two million, sixty-three thousand, seven hundred ninety-nine and three one-hundredths Kronen (2,063,799.03 Kronen); that said sum of money was due and owing

*Stipulation Amending Complaint.*

58

to plaintiffs from the defendant, the Wiener Bank-Verein of Vienna, prior to October 6, 1917, namely on April 6, 1917; and that it is now due and owing to said plaintiffs, at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917, that is, at the rate of 11.80 cents in United States currency for each Austrian krone, namely two hundred forty-three thousand, five hundred twenty-eight dollars and twenty-nine cents (\$243,528.29), which said sum the defendant, the Wiener Bank-Verein of Vienna, retains, and although demanded, refuses to pay."

59

2. By the insertion of the following paragraph in place of the last paragraph of the original Bill of Complaint.

60

"WHEREFORE your plaintiffs pray that the above mentioned defendants and each or any of them be directed and ordered to pay to the plaintiffs the sum of Two hundred forty-three thousand, five hundred twenty-eight dollars and Twenty-nine cents (\$243,528.29) with interest thereon at the rate of five per centum per annum from the 6th day of April, 1917, out of the property conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or seized by him and held by him or by the then Treasurer of the United States as aforesaid and now in the possession, custody or control of the above named defendants, the Alien Property Custodian and the Treas-

*Stipulation Amending Complaint.*

urer of the United States or each or either  
 of them as aforesaid, or out of the proceeds  
 of the sale of any or all of said property,  
 or out of any increase, income, interest,  
 dividends, coupons, or profits, which shall  
 have accrued or arisen from or upon said  
 property or said proceeds of sale up to the  
 time of said payment to the plaintiffs, and  
 that your plaintiffs have such other and  
 further relief as to the Court may seem  
 just and proper,"

61

and it is

62

FURTHER STIPULATED AND AGREED that an order  
 may be entered herein without further notice to  
 any party.

Dated, New York, March 23rd, 1923.

STOCKTON & STOCKTON,  
 Solicitors for Plaintiffs.

WM. HAYWARD,  
 United States Attorney, Solicitor for Defendants,  
 Thomas W. Miller, as Alien Property Custodian,  
 and Frank White, as Treasurer of the United  
 States.

63

(sd) MANHEIM & WACHTELL,  
 Solicitors for Defendant,  
 Wiener Bank-Verein of Vienna, Austria.

So Ordered:

(sd) ALEX GILCHRIST, JR.,  
 U. S. D. J., Clerk.

**Answer of Defendants Miller and White.**

64

IN THE  
UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity—E23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay, as  
brokers,

65

Plaintiffs,

—against—

THOMAS W. MULLER, as Alien Property Custodian,  
FRANK WHITE, as Treasurer of the United  
States, and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants.

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Now come the defendants, Thomas W. Miller, as  
Alien Property Custodian, and Frank White, as  
Treasurer of the United States, separately and  
severally answering the bill of complaint, and  
for their separate and several answers say:

66

(1) They have no knowledge or information suf-  
ficient to form a belief with respect to the aver-  
ments of paragraph numbered 1 of the bill of  
complaint, and therefore demand strict proof  
thereof;

(2) These defendants admit the averments of  
paragraph numbered 2 of the bill of complaint,  
except in so far as the said averments allege that  
the defendant, the Wiener Bank-Verein, of Vienna

*Answer of Defendants Miller and White.*

Austria, is now and at all times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the former Empire of Austria-Hungary, and/or the present Republic of Austria, and as to the said averments these defendants say that they have no knowledge or information sufficient to form a belief with respect thereto, and therefore demand strict proof thereof; 67

(3) The averments of paragraph numbered 3 of the bill of complaint are conclusions of law which these defendants are not required to answer;

(4) They admit the averments of paragraph numbered 4 of the bill of complaint; 68

(5) Answering the averments of paragraph numbered 5 of the bill of complaint these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation, determined that the Wiener Bank-Verein, of Vienna, Austria, was an enemy within the purview and meaning of the said Act, the amendments thereto and the proclamations and executive orders issued thereunder, and that certain money and other property was owing or belonging to, held for, by, on account of, and for the benefit of the said enemy. Thereupon the Alien Property Custodian required that the said money and other property be conveyed, transferred, assigned, delivered, and/or paid to him, to be by him held, administered and accounted for as provided by law, and compliance with the said demand was accomplished. 69  
The Alien Property Custodian thereafter acting

*Answer of Defendants Miller and White.*

70 pursuant to law, paid into the Treasury of the United States a large amount of money received as aforesaid, and the Alien Property Custodian and the Treasurer of the United States now hold all the money and other property so received.

Further answering said paragraph these defendants say that the determination of the Alien Property Custodian as aforesaid is not final for the purposes of this suit, and the plaintiffs herein must submit proof as to the ownership of the said money and other property, and this court must determine out of what, if any, of the said money and other property any claim which the  
71 plaintiffs herein may establish must be paid;

(6-7-8) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraphs numbered 6, 7 and 8, of the bill of complaint, and therefore demand strict proof thereof;

(9) They admit the averments of paragraph numbered 9 of the bill of complaint;

(10) They say that the averments of paragraph numbered 10 of the bill of complaint are immaterial to the purposes of this suit, and these defendants are not required to answer the same.  
72

WHEREFORE, these defendants, having fully answered the bill of complaint, pray that they be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be justly entitled.

WM. HAYWARD,

United States Attorney,

Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.



**Amendment to Answer of Defendants  
Miller and White.**

73

IN THE  
UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
Equity No. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

74

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian,  
FRANK WHITE, as Treasurer of the United  
States, and the WIENER BANK-VEREIN, of  
Vienna, Austria,

Defendants.

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Now come the defendants, Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, and by leave  
of Court heretofore granted, amend paragraph  
numbered 5 of their answer by adding thereto  
the following paragraph:

75

That there are now pending certain suits  
against the Alien Property Custodian to collect  
out of funds in the hands of the Alien Property  
Custodian certain claims. The titles of the said

*Amendment to Answer of Miller and White.*

- 76 suits, together with the venues and the amounts claimed are as follows:

Alston Tobacco Company, Inc. v. Alien Property Custodian, Treasurer of the United States, and Wiener Bank-Verein of Vienna, Austria (Southern District of New York). \$214,000.

Equitable Trust Company of New York v. Alien Property Custodian, Treasurer of the United States, and Wiener Bank-Verein of Vienna, Austria.

- 77 All of the said cases are now pending and undetermined.

WM. HAYWARD,  
United States Attorney,  
Solicitor for Thomas W. Miller, as  
Alien Property Custodian, and  
Frank White, as Treasurer of the  
United States.

**Notice of Appearance of Defendant Bank.**

79

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

80

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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*Sirs:*

PLEASE TAKE NOTICE that the defendant, Wiener  
Bank-Verein, appears in this action, and that we  
are retained as attorneys for it herein, and de-  
mand that a copy of the complaint and all other  
papers be served on us, at our office and post  
office address as stated below.

81

Dated, New York, June 12th, 1922.

Yours, etc.,

MANHEIM & WACHTELL, Esqs.,  
Attorneys for Defendant,  
Wiener Bank-Verein,  
Office & P. O. Address,  
1328 Broadway,  
Borough of Manhattan,  
City of New York.

*Answer of Defendant Bank.*

82 To:

STOCKTON & STOCKTON, Esqs.,  
2 Rector St.,  
New York City.

**Answer of Defendant Bank.**

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.  
In Equity E23-160.

83 LEOPOLD ZIMMERMAN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

84 Now comes the defendant, Wiener Bank-  
Verein, and for its answer to the bill of com-  
plaint herein, alleges upon information and  
belief:

I. It admits the allegations contained in para-  
graphs marked "I," "II," "III," "IV," "VI" and  
"VII" of the bill of complaint.

II. This defendant admits that the Alien  
Property Custodian, appointed by the President

*Answer of Defendant Bank.*

of the United States, received certain funds, securities and other property which this defendant had on deposit or within the custody of various banks within the United States, such funds, securities and other property being so held within the United States by this defendant for its own account and for the account of divers customers and correspondents of this City, and that such funds, securities and other property are now in the possession of and held by the defendant, Thomas W. Miller, as Alien Property Custodian, and/or Frank White, as Treasurer of the United States, and that the said Alien Property Custodian made a finding that this defendant was an enemy or ally of enemy within the meaning of these terms, as defined in the Trading with the Enemy Act, approved October 6th, 1917; and it denies each and every allegation contained in paragraph marked "V" of the said bill of complaint. 85 86

III. This defendant admits that on or about April 6th, 1917, the plaintiffs had on deposit with this defendant, a kronen balance amounting to 3,313,799.03 kronen, which this defendant held subject to the orders for the disposal thereof, to be sent from time to time by the plaintiffs, and this defendant denies each and every other allegation contained in paragraph marked "VIII" of the bill of complaint. 87

IV. This defendant denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs marked "IX" and "X" of the bill of complaint, and demands strict proof thereof.

*Answer of Defendant Bank.*

88       FOR A FIRST DEFENSE HEREIN, THIS DEFENDANT  
ALLEGES:

V. That this defendant is a banking corporation duly organized under the laws of the Empire of Austro-Hungary, prior to April 6th, 1917, with its principal office at the City of Vienna, Austria, and that the deposits aggregating the sum of 3,313,799.03 kronen were made by the plaintiffs with this defendant, pursuant to an agreement and understanding between them, by which it was mutually agreed and understood among other things, that the relations and mutual rights and  
89 obligations arising between the plaintiffs and this defendant, shall be governed by and shall be subject to the laws of Austria.

VI. That at the time the said agreement and understanding were made and during the time that the deposits of the kronen as alleged in the bill of complaint were made with this defendant, it was provided by the terms of section 1425 of the General Civil Law of Austria, substantially as follows:

90       "Where a debt cannot be paid because the creditor is unknown, absent or refuses to accept payment, or because of other important reasons, the debtor must deposit the subject matter of the debt in Court. Such action when done according to law and notice thereof is given to the creditor, discharges the debtor from his obligations and puts upon the creditors all risks respecting the subject matter of the debt."

VII. This defendant further alleges that the General Civil Law Code was at that time and is now a system of Statute Law enacted by the duly

*Answer of Defendant Bank.*

appointed legislative authority of Austria, and that at all the times mentioned in the bill of complaint and in this answer, such body of Statute Law was the law of Austria. 91

VIII. That subsequent to the said 6th day of April, 1917, and prior to the commencement of this suit, and owing to the absence of these plaintiffs, and owing to the refusal of these plaintiffs to accept the payment of their balance of the kronen account hereinbefore named, and owing to the plaintiff's expressed intention to refuse such payment, should same be tendered at the then prevailing rate of exchange, this defendant deposited the balance of these plaintiffs' kronen account with this defendant, with the Local Law Court designated for that purpose, pursuant to the terms of Section 1425 of the General Civil Law Code hereinbefore referred to, and duly gave written notice of such deposit to these plaintiffs. 92

IX. That by reason of the mutual agreement and understanding between the plaintiffs and this defendant, this defendant became entirely and duly released and discharged from the claim and cause of action alleged in the bill of complaint herein. 93

FOR A SECOND DEFENSE, THIS DEFENDANT FURTHER ALLEGES:

X. That at or about the times set forth in the bill of complaint, the plaintiffs accepted a large number of orders from their customers in the United States, to purchase for such customers various sums or amounts of kronen in Austria, and that for the purpose of enabling

*Answer of Defendant Bank.*

- 94 them to execute the orders so obtained by it for the purchase and delivery of kronen to certain designated persons or corporations in Austria, these plaintiffs established a kronen account with this defendant, with the purpose and intention, and with the agreement and understanding between the plaintiffs and this defendant that at all times, the said kronen account on deposit with this defendant should be applied in the execution of orders for the purchase of kronen received by the plaintiffs from their customers and transmitted to this defendant, such orders
- 95 to be evidenced either by cable transfers, wireless or otherwise, or by written orders, drafts or checks delivered by the plaintiffs to their customers, who became purchasers of kronen as aforesaid, and that this defendant was required to pay such kronen account in kronen, and not in any other currency or by any other means, and this defendant further alleges that this system of International money transfers has been established by International banking usage and custom, and that this International banking usage and custom was well known to the plaintiffs as well as to the defendant, and that the relations
- 96 of the plaintiffs and this defendant and their mutual rights and obligations were established with reference to such International banking usage and custom, and that the plaintiffs, in making settlements with their customers for the return or refund of such kronen purchases for their behalf by the plaintiffs, have been made and are making such settlement on the basis of the prevailing rate of kronen exchange at the time of the return or refund, and not at the average cable rate mentioned in paragraph



*Answer of Defendant Bank.*

"VIII" of the bill of complaint, and that by reason of the premises, the kronen balance deposited with this defendant, if repayable to the plaintiffs at all, is repayable in kronen, and not at the cable rate set forth in paragraph "VIII" of the bill of complaint; and in converting such kronen into American dollars, the plaintiffs, if entitled to recover at all, are entitled to recover only at the rate of exchange prevailing between kronen and dollars at the date of the rendition of the judgment; and this defendant further alleges that if these plaintiffs should be permitted to recover at any other than the prevailing rate of exchange between kronen and dollars at the time of the rendition of a judgment, if any herein, they would be unjustly enriched, and this defendant would suffer an unfair, unjust and inequitable hardship. 97 98

WHEREFORE, this defendant prays that upon a final hearing of this cause, it be ordered and decreed that the bill of complaint of the plaintiff herein be dismissed on the merits, upon the ground of the payment to the Local Law Court of the number of kronen held by this defendant as a general deposit for the plaintiffs, and in the alternative, that the plaintiffs receive a judgment against this defendant for the sum of 3,313,799.03 kronen, expressed in American dollars, at the rate of exchange prevailing on the date of the rendition of the judgment, with appropriate costs of the action. 99

MANHEIM & WACHTELL,

Attorneys for Defendant,

Wiener Bank-Verein,

1328 Broadway,

New York City,

Manhattan Borough.

*Answer of Defendant Bank.*

100 State of New York,  
City and County of New York—ss.:

SAMUEL R. WACHTELL, being duly sworn, deposes and says:

I am an attorney and counselor at law, and a member of the firm of Manheim & Wachtell, attorneys for the defendant, Wiener Bank-Verein, herein.

101 I have read the foregoing answer and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe the same to be true.

The source of my information and the grounds of my belief are various written communications in my possession, sent to me by the defendant and the defendant's agents, and personal conversations had by me with one of the managing directors of the defendant.

102 The reason that this verification is made by deponent and not by the defendant is because this defendant is not in the United States, but is a foreign corporation having its principal office in the City of Vienna, Austria, and this deponent is its duly authorized agent for the purpose of appearing in and defending this action.

SAMUEL R. WACHTELL.

Sworn to before me this  
23rd day of March, 1923.

DINAH HOROWITZ,  
Commissioner of Deeds,  
N. Y. City.

**Stipulation of Facts and Amending  
Pleadings.**

103

UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

104

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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The solicitors for the plaintiffs and the defend-  
ant, Wiener Bank-Verein, of Vienna, Austria,  
hereby stipulate for the purposes of the above en-  
titled action only.

105

1. The defendant, Wiener Bank-Verein, is a  
foreign corporation engaged in the business of  
banking. It was organized under the laws of the  
Empire of Austria-Hungary, and received its cor-  
porate charter from the duly constituted Govern-  
mental Department under that Empire empowered  
to issue the same. It has continued its corporate  
existence unchanged during the changes in the  
Government of Austria occurring during and

*Stipulation of Facts and Amending Pleadings.*

106 after the war and its charter has been continued and validated by the present Austrian Government. Its principal place of business is in Vienna, Austria. It has no branch office in the United States of America.

2. For a number of years preceding the outbreak of the war between the United States and Austria, plaintiffs maintained a bank account in kronen with the defendant, the Wiener Bank-Verein, in which the plaintiffs from time to time made deposits in kronen for the purpose of providing payment of drafts and orders issued and transmitted by the plaintiffs by letter, cable, wireless or otherwise, and drawn on and payable at the defendant, Wiener Bank-Verein, at Vienna.

3. During the period that the plaintiffs maintained the bank account with the defendant, the Wiener Bank-Verein, the latter sent to the plaintiffs and the plaintiffs received periodic and regular statements of account at least once in three months, such statements of account being rendered on a printed sheet identical with the facsimile annexed to this stipulation and marked Exhibit A, with the exception of the blanks shown on the said facsimile, which blanks were filled out in each statement of account in accordance with the facts shown on such statement.

4. Prior to the time when the plaintiffs opened their kronen account with the defendant, Wiener Bank-Verein, the General Civil Law Code of Austria was and now is a system of statute law enacted by the duly erected legislative authority of Austria, and at all such times the said

*Stipulation of Facts and Amending Pleadings.*

General Civil Law contained and now contains a section known as section 1425, which reads as follows: 109

"If a debt cannot be paid because the creditor is unknown, absent, or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor." 110

5. After July 14th, 1919, and prior to the first day of April, 1920, plaintiffs refused to accept the kronen on general deposit with defendant bank as offered by said defendant either in kind or in United States currency at the rate of exchange then prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between United States dollars and Austrian kronen prevailing in the United States during the month immediately preceding the outbreak of war between the United States and Austria Hungary, namely, 11.80 United States cents for each Austrian krone. 111

6. On or about the 1st day of April, 1920, the defendant, the Wiener Bank-Verein, deposited in the Circuit Court for the Interior at Vienna, in part 6 thereof, the number of kronen in its bank

*Stipulation of Facts and Amending Pleadings.*

112 stated to be due and owing to the plaintiffs as of April 6, 1917.

7. The Circuit Court for the Interior at Vienna, Part 6, was the appropriate Court in which deposits pursuant to Section 1425 of the General Civil Law Code aforesaid were permitted to be made by citizens of Austria.

113 8. Thereafter, notice of the said deposit in the Circuit Court aforesaid, was given by the defendant, the Wiener Bank-Verein, to the plaintiffs, which notice the plaintiffs received and which is in evidence herein, marked Plaintiff's Exhibit 1.

9. In so far as the facts stipulated herein may be at variance with the pleadings of the respective parties those pleadings are deemed amended to conform to said facts.

Dated, New York, December 5th, 1923.

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs.

114 MANHEIM & WACHTELL,  
Solicitors for Defendant,  
Wiener Bank-Verein.

## **Agreed Translation of Defendants' Exhibit A.** 115

We enclose extract of your account closed per  
 .....and showing a balance of  
 K..... in.....favor  
 requesting you to return the enclosed blank after  
 reconciliation duly signed to our address Wiener  
 Bank-Verein, Vienna, 1 Schottengasse 6.

At the same time we beg to request you to take  
 notice of the general conditions, contained within,  
 governing relations with our institution and of the  
 conditions for security accounts.

Yours very truly, 116

WIENER BANK-VEREIN.

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### **GENERAL TERMS GOVERNING THE BUSI- NESS RELATIONS WITH THE WIENER BANK-VEREIN.**

1. On rendering statement of an account cur-  
 rent we charge in addition to agreed interest, com-  
 mission and depot fees also postage, stamp-fees,  
 cable—and other petty expenses which can be  
 debited in a lump sum. 117

2. Claims as to statements rendered for cur-  
 rent or safekeeping accounts must be made at  
 latest within four weeks after delivery of such  
 statement. Claims referring to other statements  
 or notices must be submitted to us at latest within  
 three days after delivery of our letter, and when  
 notice has been given by telegraph, on the day of  
 receipt of the telegram.

*Agreed Translation of Defendants' Exhibit A.*

118      Claims regarding execution of stock exchange orders have to be made by telegraph, immediately after receipt of our advice relative thereto. Claims referring to non-execution of stock exchange orders are likewise to be made by telegraph on the day on which in the regular course of mails the stock exchange quotation referred to could have reached the domicile of the customer.

119      In the event that claims are not made in due time according to the above regulations then the statements, contracts and notices as rendered and dispatched by us are to be considered as accepted and found correct. Correctness of notices given by us by telegraph is to be considered as subject to confirmation by mail. All communications addressed by us to our business friends are to be considered as mailed properly when addressed to the last domicile, made known to us.

120      3. Unless otherwise agreed upon, we are entitled to cancel existing connections at any time and according to our free decision. When closing out an account, which is done by way of notice to the account owner, any balance in our favor becomes immediately due and payable to us and no specific request to that effect is required on our part; any liability originating from bills, pledges, guarantees, etc., must be immediately secured upon our demand by a cash deposit. Until such time as all obligations in our favor have been properly fulfilled by the owner of the account, the general conditions as agreed upon remain in force; we are however entitled to charge at least the legal rate of interest on delay in payments.



*Agreed Translation of Defendants' Exhibit A.*

4. In any orders which we receive for the purchase or sale of securities, drafts or foreign exchange, we are at all times permitted to execute such orders either through a third person or to be ourselves the purchaser or seller, as the case may be; this in accordance with the provisions as laid down in Article 376 of the "Handelsgesetzbuch." Should no mention be made in our notices of execution regarding the manner and method of the execution, then we ourselves become the purchaser or seller, as the case may be, of the subject matter of the transaction. 121

5. We are permitted to have orders executed through a third person, and are liable only for our errors in the transmission of such orders to the third person. The same also applies to any securities which we keep in safekeeping with third persons in foreign countries. In the cashing and discounting of any commercial paper on neighboring or foreign places we can at no time assume any responsibility for the time presentment and protest of such commercial paper, nor for the correct handling thereof in accordance with specific regulations. 122

6. Orders received for execution by telegraph and telephone, and further, the transmission of such orders by telegraph or telephone, as well as notices of execution of such orders by telegraph or telephone, are made at the risk of the party giving such orders. 123

7. In the execution of any orders given us by our customer for the payment of any monies to himself or for his account to a third party, if no

*Agreed Translation of Defendants' Exhibit A.*

124 specific instructions are given, we reserve the right to execute such orders in such manner as we may see fit, either making payment at the place indicated, by sending the money, transferring same through the Postal Savings Bank, by crediting the account, remitting by check, etc.

In the absence of instructions to the contrary, checks are mailed in registered letters; money, securities or other valuables, either by stating the full value when expressing the same or having the same insured, in all cases at the risk of the customer.

125 8. Credit entries made against checks, drafts, drawn securities or such on which notice has been given, coupons, etc., are always to be considered subject to payment thereof.

We are entitled to the claims and rights accruing to as out of unpaid drafts or checks against prior endorsers and other liable parties, even in the event that the account of the remitter has already been debited for non payment of the item.

126 9. Information, recommendations and counsel and advice are at all times gladly given to the best of our knowledge, but without any responsibility on our part.

10. For all claims of a legal nature the Head Office and its several branches are to be considered as one.

11. The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into considera-

*Agreed Translation of Defendants' Exhibit A.*

tion, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be met as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be. For the execution however of stock exchange orders the conditions in force on the stock exchange where such orders are executed will rule. This applies also to stock exchange orders where we ourselves enter as buyers or sellers for own account.

127

128

REGULATIONS GOVERNING SECURITY DEPOSIT  
ACCOUNTS:

1. We guarantee according to law the safekeeping for our clients of securities as well as of private documents.

2. Any business arising out of the safekeeping of such securities, as for instance the cashing of coupons, as well as of any drawn or due securities, the renewal of the coupon sheets, etc., we shall attend to without being requested to do so by the customer: we assume, however, no obligation or liability in such instances and it is up to the customer to let us have the necessary instructions from time to time regarding such matters. Payments on account of securities, exchanging or converting same, the exercise of rights and other matters of a similar nature we shall only execute on explicit orders, but we will endeavor, without any obligation on our part, to advise the customer in time of such due dates, etc.

129

*Agreed Translation of Defendants' Exhibit A.*

130 All securities which are received at our various Receiving Tellers windows will be subjected to a revision whether a notice regarding same has been posted, in accordance with the "Amtlicher Anzeiger." All drawn securities will be subjected to a scrutiny in accordance with the drawn lists, and the drawn pieces will be collected as soon as possible.

For any error in these revisions and for any consequences which may result by virtue of steps taken for the purpose of amortization of securities as well as for any legal proceedings arising therefrom we do not assume any liability whatsoever.

131

Unless specific instructions to any other effect will reach us in due time, we are all times permitted to exercise any voting privileges which may arise from or are attached to any securities which we are holding in safekeeping for our customers.

3. The fees for the safekeeping of securities will be charged according to the market value of the securities, listed on the stock exchange if the market price is higher than the nominal value, in other cases the nominal value will be the guide.

132 In the absence of any agreement as to the fees to be charged for the safekeeping of securities, such fees will be charged in accordance with our printed tariff.

4. Any securities which have been purchased for our clients in foreign places and have been taken over for them in foreign countries, will, as a rule be kept in safekeeping at such foreign places for our clients, at our risk, as far as the selection of the depositary is concerned, unless instructions

*Agreed Translation of Defendants' Exhibit A.*

have been given to have the securities forwarded 133  
to us.

5. All securities, including interest and dividend coupons due and to grow due, as well as all other objects of value, particularly commodities and goods, which in the course of our business transactions with our customers have come into our possession or partial possession, will constitute without any previous agreement to that effect, liens in our favor to secure all obligations due and to grow due, for their account, and we are entitled, without prior judicial procedure, to sell the property subject to the lien at any time 134  
suitable to us and at any place in order to satisfy our claims, and any claims of our debtors can be adjusted by way of compensation, or all their claims can be refused acknowledgment by us until ours have been fully satisfied. As for pass books of Savings Banks, Banking Associations or Banks, including such of our own issue, we have at all times the right to withdraw the deposits up to the full amount of our claims against the owner.

**Stipulation Amending Previous Stipulation.**

136

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Equity—E 23 -160.

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

137

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

138

IT IS HEREBY STIPULATED between the solicitors  
for the plaintiffs and the solicitors for the de-  
fendant, Wiener Bank-Verein, that the stipulation  
made between the said solicitors and dated New  
York, December 5, 1923 be amended as follows,  
the provisions of paragraph 9 of said stipulation  
of December 5, 1923 to apply with equal force  
to the amendments hereby inserted.

1. That paragraph 5 of the stipulation dated  
New York, December 5, 1923, above mentioned  
is modified by striking out the last line thereof  
reading

"11.80 United States cents for each  
Austrian krone"

*Stipulation Amending Previous Stipulation.*

and inserting in place thereof the words

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"11.18 United States cents for each Austrian krone."

2. That a new paragraph, numbered 8A, is inserted in said stipulation dated December 5, 1923, as follows:

"8A. From the time when the plaintiffs opened the account sued on with the defendant, Wiener Bank-Verein, said defendant credited the plaintiffs' said account with interest at the rate of  $2\frac{1}{2}$  per cent. per annum to April 6, 1917. In the quarterly statements of account rendered by the defendant bank to the plaintiffs, the fact that interest was so credited at such rate was shown and the plaintiffs did not object to the rate at which interest was thus credited on their account by said defendant.

140

The deposit made in the Circuit Court of Vienna, Part VI, on April 1, 1920, of the number of kronen in defendant bank stated to be due and owing to the plaintiffs as of April 6, 1917, included a further sum of kronen sufficient to equal  $2\frac{1}{2}$  per cent. per annum interest down to April 1, 1920, the date of such deposit, on the amount stated to be due and owing to plaintiffs as of April 6, 1917."

141

3. That a further new paragraph, numbered 8-B, is inserted in said stipulation dated December 5, 1923, as follows:

*Stipulation Amending Previous Stipulation.*

- 142           "8B. On or about March 25, 1919 the plaintiffs filed with the Alien Property Custodian of the United States a notice of claim, substantial copy of which is annexed hereto and made a part hereof and is admitted in evidence, marked 'Plaintiffs' Exhibit 4.' "

Dated, New York, December 18, 1923.

STOCKTON & STOCKTON,  
Solicitors for the Plaintiffs.

- 143           MANHEIM & WACHTELL,  
Solicitors for the Defendant,  
Wiener Bank-Verein.



### Plaintiffs' Exhibit 4.

Reed. A. P. C. Mar. 25, 1919, Claim #802.  
Wiener Bank Verein, Vienna.

145

Nixed

### ALIEN PROPERTY CUSTODIAN.

NOTICE OF CLAIM PURSUANT TO SECTION 9 OF  
"TRADING WITH THE ENEMY ACT."

#### INSTRUCTIONS.

Notice of claim, under oath, must be executed in duplicate by claimant and filed with the Alien Property Custodian, attention of Bureau of Law, Washington, D. C.

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If claimant makes application to the Attorney General, in pursuance of sec. 9 of the "Trading with the enemy Act," and the Presidential Executive Orders thereunder, for the payment, conveyance, transfer, assignment, or delivery to said claimant of money or other property held by the Alien Property Custodian, he must append to his application to the Attorney General a sworn copy of this notice of claim.

Each individual claim must be presented on a separate form.

147

Section 2 of the "Trading with the enemy Act" defines "enemy" and "ally of enemy" as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory

*Plaintiffs' Exhibit 4.*

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(including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

149

"(b) The government of any nation with which the United States is at war or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

150

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'

"The words 'ally of enemy,' as used herein, shall be deemed to mean——

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is

*Plaintiffs' Exhibit 4.*

at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory. 151

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof. 152

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.' " 153

The Presidential Proclamation of February 5, 1918, in pursuance of section 2 (c) of the act, included within the meaning of the word "enemy," for the purpose of the "Trading with the enemy Act":

"All natives, citizens, or subjects of the German Empire or of the Austro-Hungarian Empire who, by virtue of the provisions of sections four thousand and sixty-seven,

*Plaintiffs' Exhibit 4.*

154

four thousand and sixty-eight, four thousand and sixty-nine, and four thousand and seventy, of the Revised Statutes, and of the proclamations and regulations thereunder, have been heretofore or may be thereafter transferred after arrest into the custody of the War Department for detention during the war."

Section 9 of the "Trading with the enemy Act" is as follows:

155

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property, or any part thereof, shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery to said claimant of the

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*Plaintiffs' Exhibit 4.*

money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall

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159

*Plaintiffs' Exhibit 4.*

160

be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

161

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The Executive Order of October 12, 1917, provides, among other things, as follows:

"XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provision of section 9 of the 'Trading with the enemy Act.'"

TO FRANCIS P. GARVAN,  
Alien Property Custodian,  
Washington, D. C.

162

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the "Trading with the enemy Act," hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): Z. & F.

*Plaintiffs' Exhibit 4.*

2. Address of claimant: 9 Wall St., N. Y. C. 163
3. Name of enemy or ally of enemy whose property is affected by this claim: Wiener Bank-Verein.
4. Residence or last known address of enemy or ally of enemy: Vienna, Austria.
5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: Numerous customers listed in statement filed with A. P. C. Bureau 2/3/19.
6. Address or addresses of such person or persons: ..... 164
7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following question must be answered:
- (a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:.....
- Address: .....  
(No.) (Street.) (City.) (Country.)
- (b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property): ..... 165
8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any

*Plaintiffs' Exhibit 4.*

- 166 set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)

Monies & securities due to claimant as follows:

		Face or par-value	
Value	Cash Bal.	of securities	Total Amt.
\$	50.02		50.02
Kronen	2,951,027.33	1,080,800.—	4,031,827.33

Interest accrued from 1/1/16

On cash bal. at 4%

On securities (see statement filed 2/3/19)

- 167 The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

- 168 Dated Mar. 19, 1919.

(Signature of party making claim.) Z. & F.  
M. H. H.

(Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

(Seal.)



**Opinion.**

169

**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****E 23-160.**


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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

170

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE,  
as Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

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STOCKTON & STOCKTON (Joseph M. Hartfield and  
Hamilton Vreeland, Jr., of Counsel), Solic-  
itors for Plaintiffs.

WM. HAYWARD (Thomas J. Crawford, Assistant  
U. S. Attorney, of Counsel), U. S. Attorney,  
Solicitor for Defendants Miller and White.

171

MANHEIM & WACHTELL, Solicitors for Defendant  
Wiener Bank-Verein, Austria.

KNOX, *D. J.*

This suit is brought under Section 9 of the  
Trading with the Enemy Act for the recovery  
by plaintiffs of the dollar value as of April 6,

*Opinion.*

172 1917 of 2,063,799.03 kronen which were then on deposit with the Wiener Bank-Verein of Vienna, Austria, and which are said to have been due and owing.

The Alien Property Custodian and the Treasurer of the United States admit their possession of certain money and property which was, pursuant to statute requirement, determined to belong to the bank, during the time it was an alien enemy, and which, for that reason, was sequestered. They also allege that suits of persons other than plaintiffs are pending against them whereby it is sought to collect the sum of about  
173 \$750,000 from said money and property.

The bank admits that as of April 6, 1917, plaintiffs had on deposit with it the specific number of kronen, and that these were held subject to orders for the disposal thereof. Denial is made that payment of the kronen was due as claimed by plaintiffs.

The parties, excepting the Custodian and the Treasurer, have stipulated the following facts:

1. That the bank was organized and, prior to and during the war functioned under the laws of the Empire of Austria-Hungary; that  
174 it still does business in Vienna under a validation of its charter by the Austrian Government. It has no branch office within the United States.

2. That plaintiffs, for a number of years preceding the outbreak of war, maintained a bank account with the bank in which they made deposits in kronen for the purpose of providing payment of their drafts and orders issued and

*Opinion.*

transmitted by letter, cable, wireless, etc., and 175  
drawn on and payable at the bank.

3. That at least every three months plaintiffs received in ordinary course periodic statements of the condition of the account. These were upon a printed form containing the following provision:

"The relations existing between us and our business friends will in general be governed by the laws in force in Austria. So far as transactions with our main office come into consideration, the City of Vienna is to be considered the place where payment is to be made or where obligations are to be made, as the case may be. In transactions existing between customers and our branches, the City where the branch is domiciled becomes the place of payment or the place of fulfillment of liabilities as the case may be." 176

4. That at all times from a time prior to the opening of the account, Section 1425 of the General Court law of Austria continued and remained in force. It reads: 177

"If a debt cannot be paid because the creditor is unknown, absent or dissatisfied with the offer, or because of other important reasons, the debtor may deposit in court the subject matter in dispute; or, if it is not susceptible of such action he may take legal steps for its custody. If legally carried out and the creditor has been informed thereof, either of these

*Opinion.*

178           measures discharges the debtor of his obligation, and places the subject matter delivered at the risk of the creditor."

179           5. That after July 14, 1919, and prior to April 1, 1920, plaintiffs refused to accept the kronen on deposit with the bank, offered either in kind or in United States currency, at the rate of exchange then prevailing, but demanded the amount of said kronen on deposit as of April 6, 1917, at the average cable transfer rate of exchange between the two currencies prevailing in the United States during the month immediately preceding the outbreak of the war, viz: 11.18 United States cents for each kronen.

          6. That on or about April 1, 1920, the bank deposited in the Circuit Court for the Interior at Vienna, in part 6 thereof, the number of kronen stated to be due and owing as of April 6, 1917.

          7. That such Circuit Court was the appropriate depository for deposits made pursuant to Section 1425 of the General Civil Law Code.

180

          8. That notice of the deposit was given to and received by the plaintiffs.

          8-a. That plaintiffs' account, during its existence, was credited with interest at  $2\frac{1}{2}\%$  per annum down to April 6, 1917, and such credits were shown on all quarterly statements of the account; and that such interest was calculated to the day of the deposit of the funds in the Circuit Court and was included therein.

*Opinion.*

8-b. That on March 25, 1919, plaintiffs filed their claim with the Alien Property Custodian for the moneys alleged to be due and owing from the bank.

181

Prior to the outbreak of war between the United States and Austria, upon December 7, 1917, plaintiffs made no demand for their balance upon deposit with the bank. Until such demand was made, the balance upon deposit was not due and payable. *Zimmermann & Forshay v. Miller and Deutsche Bank*, decided April 25, 1924. During the continuance of the war, and down to July 14, 1919, when trade relations and communications were re-established between Nationals of the United States and Austria, no demand upon the bank for payment could lawfully be made. This is true even though the bank at all times had an agent within the United States. The agent, assuming him to have been in funds, was not permitted to deal with plaintiffs upon behalf of his principal. Nor, is the circumstance that the bank, throughout the period of the war, continued to make payments upon account of outstanding orders of the plaintiff (there being no provision of Austrian law to the contrary) of any particular consequence. The war and our law, incident thereto, made it impossible to demand payment of the account from the bank. Had it been the desire of plaintiffs to render their deposit due and payable during the progress of the war, they should have made demand upon the Custodian. I quote from Section 8 of the Trading with the Enemy Act.

182

183

"That any person not an enemy or ally of enemy who is a party to any lawful

*Opinion.*

- 184 contract with the enemy or ally of enemy,  
the terms of which provide for a termina-  
tion thereof upon notice or for acceleration  
of maturity on presentation or demand  
\* \* \* may terminate or mature such  
contract by notice or presentation or de-  
mand served or made on the Alien Prop-  
erty Custodian in accordance with the law  
and the terms of such instrument or con-  
tract and under such rules and regulations  
as the President shall prescribe and such  
notice and such presentation and demand  
185 shall have in all respects the same force  
and effect as if duly served or made upon  
the enemy or ally of enemy personally."

Not having seen fit to take advantage of this provision of law, plaintiffs cannot here be heard to complain that during their inaction and before the time at which they demanded payment from the bank after July 14, 1919, the rate of exchange of Austrian kronen continued to fall to their detriment.

- 186 So far as the evidence shows, the first communication bearing the suggestion of a demand for the payment of plaintiffs' credit balance is to be found in their cable of August 12, 1919, reading as follows:

"Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen seventeen rate of eleven eighteen STOP if you agree wire us to that

*Opinion.*

effect and we will send you necessary papers to be filled out and signed by you **STOP** this will obviate lawsuit which we otherwise will be compelled to institute."

187

The cable was not understood by the bank and on August 12, 1919, it sent plaintiffs this reply:

"Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned."

No particular attention seems to have been paid to the message and the bank soon proceeded to exchange the kronen of plaintiffs' old account, which had ceased to be legal tender in Austria, into a new issue of kronen. Protest was made to this action and about April 1, 1920, the bank reestablished the old account. This being done, the proceeds were deposited in Court pursuant to the Section of the Austrian Civil Code, heretofore quoted. Plaintiffs were given the privilege to order the deposit withdrawn, and to again establish the account in new kronen upon the bank's books. This privilege was never exercised.

188

Upon this evidence, and upon the stipulation of facts, it is difficult to arrive at a conclusion as to the exact date upon which plaintiff's cause of action arose: It may be said, for instance, that the cable of August 12, 1919, lacked some of the elements of a proper demand, and that for such reason, liability should not be imposed as of August 12, 1919.

189

The stipulation of facts merely says that after July 14, 1919, and prior to the first day of

*Opinion.*

190 April, 1920, "plaintiffs refused to accept the kronen on general deposit \* \* \* as offered either in kind or in United States currency at the rate of exchange then prevailing \* \* \* Since neither of the parties has chosen to introduce into evidence all of the correspondence passing between them over the period extending from August 12, 1919 to April 1, 1920, I am perhaps warranted in taking the former date as the day of demand, although the cable lacked some of the characteristics of a legal demand, it was sufficient to apprise the bank that plaintiffs wanted their money—even now, the parties are no nearer an agreement as to what rate of exchange should be applied in converting the kronen into exchange than they were upon the day the cable was sent. When the message was received, the bank might well have offered the deposit as of the rate of exchange then prevailing. Not having done so, there is no injustice, I think, in holding that day to be the one as of which the account is to be settled, and I so hold.

191 One question remains and it is this—The bank argues that its deposit of April 1, 1920 with the Austrian Court, pursuant to Section 1425 of the Austrian Civil Code, should be regarded as a discharge of its obligation, and as casting the risk of further depreciation of the kronen upon the plaintiffs. Unless I am in error in having fixed August 12, 1919 as the day upon which plaintiffs were entitled to their deposit, there can be no merit in the bank's contention. Obviously, the deposit of April 1, 1920 may not have been commensurate with the extent of the bank's liability, as of August 12, 1919, and the bank not



*Opinion.*

having had an opportunity to receive kronen converted into dollars as of that date, cannot be called upon to suffer subsequent declines in such value.

193

Furthermore, the Trading with the Enemy Act affords plaintiffs a remedy by which they may here obtain such relief as they are entitled to receive. The extent and character of the relief to be afforded is not to be impaired or frustrated by what the debtor may have chosen to do pursuant to the provisions of a foreign statute. Should the present bill be dismissed, as is asked, plaintiffs would be required to collect their debt, whatever it may now be worth, at Vienna. Such result would not comport with the purpose of our own remedial legislation.

194

Plaintiffs may have a decree for the value of their deposit in dollars calculated at the rate of exchange prevailing as between kronen and dollars upon August 12, 1919, with interest from that date.

April 25, 1924.

U. S. D. J.

195

# **Notice of Entry of Final Decree.**

196

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.**

**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B.  
BLUMENTHAL, DAVID FORSHAY and ISAAC  
GUTENSTEIN, co-partners, doing business un-  
der the firm name and style of Zimmermann  
& Forshay, as brokers,**

**Plaintiffs,**

**—against—**

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**THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.**

*Sirs:*

PLEASE TAKE NOTICE that the within is a true copy of a decree duly made and entered in the within entitled suit and filed in the office of the Clerk of the United States District Court, for the southern district of New York, on the 28th day of June, 1924.

Dated, New York, June 28th, 1924.

Yours, etc.,

198

**STOCKTON & STOCKTON,**

Solicitors for Plaintiffs,

Office & P. O. Address,

2 Rector Street,

New York City.

To:

**MANHEIM & WACHTELL, ESQS.,**

Solicitors for Defendant,

Wiener Bank-Verein,

1328 Broadway, New York City.

**WILLIAM HAYWARD, ESQ.,**

Solicitor for Defendants,

Thomas W. Miller and Frank White.

**Final Decree.**

199

At a Term of the United States District Court, held in and for the Southern District of New York, at the United States Court House, Post Office Building, Borough of Manhattan, City of New York, on the 24th day of June, 1924.

Present :—HON. JOHN C. KNOX,

*U. S. District Judge.*

E. 23-160.

200

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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201

This case came on to be heard, and after hearing the testimony of the parties and the argument, and upon filing of the opinion of the Court, it was

ORDERED, ADJUDGED AND DECREED, that the defendant Wiener Bank-Verein of Vienna, Austria, is justly and truly indebted to the plaintiffs in

*Final Decree.*

202 the sum of Fifty thousand, nine hundred and  
nineteen dollars and ninety-seven cents (\$50,-  
919.97), and it is further

203 ORDERED, ADJUDGED AND DECREED, that the de-  
fendants, Thomas W. Miller, as Alien Property  
Custodian of the United States, and Frank White,  
as Treasurer of the United States, pay over to  
the plaintiffs, from the property and money of  
said defendant Wiener Bank-Verein of Vienna,  
Austria, held by said Thomas W. Miller, as Alien  
Property Custodian of the United States, and/or  
Frank White, as Treasurer of the United States,  
the sum of Fifty thousand, nine hundred and  
nineteen dollars and ninety-seven cents (\$50,-  
919.97), with interest thereon from August 12,  
1919, in the sum of fourteen thousand, seven  
hundred sixty-six dollars and eighty cents  
(\$14,766.80), together with the plaintiffs' costs  
herein as taxed at one hundred five dollars and  
eighty cents (\$105.80), within 90 days after the  
entry of this order.

(Sd) JNO. C. KNOX,  
United States District Judge.

204

## Plaintiffs' Petition for Appeal.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.

205

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN, of Vienna, Austria,  
Defendants.

206

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*To the Honorable District Judge:*

The above named plaintiffs, feeling aggrieved  
by the decree rendered and entered in the above  
entitled cause on the 24th day of June, A. D.  
1924, do hereby appeal from said decree to the  
Circuit Court of Appeals for the Second Circuit  
for the reasons set forth in the assignment of  
errors filed herewith, and they pray that their  
appeal be allowed and that citation be issued as  
provided by law, and that a transcript of the  
record of proceedings and of the documents upon  
which said decree was based, duly authenticated,  
be sent to the Circuit Court of Appeals for the  
Second Circuit under the rules of such Court  
in such cases made and provided, and your peti-  
tioners further pray that a proper order relating  
to the security to be required of them be made.

207

Dated, New York, August 26, 1924.

(Sd) STOCKTON & STOCKTON,  
Solicitors for Plaintiffs.

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## Plaintiffs' Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

209

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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COME, NOW, the above named plaintiffs and file the following assignments of error, upon which they will rely upon their appeal from the decree made by this Honorable Court on the 24th day of June, 1924, in the above entitled cause.

210

First: That the Court erred in holding that until demand was made by plaintiffs for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

Second: That the Court erred in not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

*Plaintiffs' Assignments of Error.*

Third: That the Court erred in not holding that there was a breach of the contract of deposit by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919. 211

Fourth: That the Court erred in not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria Hungary.

Fifth: That the Court erred in not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile. 212

Sixth: That the Court erred in not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading with the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy."

Seventh: That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917. 213

Eighth: That the Court erred in not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 7th paragraph hereof at the rate of six per cent. per annum from April 6, 1917. 213

*Plaintiffs' Assignments of Error.*

214 Ninth: That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

Tenth: That the Court erred in not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 9th hereof at the rate of five per cent. per annum from December 7, 1917.

215

WHEREFORE plaintiffs appellants pray that the decree of the said Court may be modified and in order that the foregoing assignments of error may be made a part of the record, the plaintiffs-appellants present the same to the Court and pray that such disposition be made thereof as is in accordance with law and the Statutes of the United States in such matter made and provided, all of which is respectfully submitted.

Dated, New York, August 27, 1924.

216

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs-Appellants,  
Office & P. O. Address,  
2 Rector Street,  
Borough of Manhattan,  
New York City.



## Allowance of Plaintiffs' Appeal.

217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

218

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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Upon reading the petition of the plaintiffs herein for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

ORDERED that the appeal as prayed for be and it hereby is allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit, and

219

FURTHER ORDERED that the bond on appeal be fixed at the sum of \$250.00.

Dated, New York, August 26, 1924.

WILLIAM BONDY,  
U. S. D. J.

### Citation on Appeal by Plaintiffs.

220

*To Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein, of Vienna, Austria.*

#### GREETING :

221

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on the 25th day of September, 1924, pursuant to an allowance of appeal filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers, are appellants and you are the appellees, to show cause, if any there be, why the final decree in said allowance of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

222

Given under my hand at the Borough of Manhattan, City of New York, in the District and Circuit above named this 26th day of August, in the year of our Lord, one thousand nine hundred and twenty-four, and the Independence of the United States one hundred and forty-ninth.

WILLIAM BONDY,  
U. S. District Judge.

## Plaintiffs' Notice of Appeal.

223

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

224

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

---

*Sirs:*

PLEASE TAKE NOTICE that the above named plaintiffs hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from the final decree made and entered on the 24th day of June, 1924, directing that the defendants Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, pay over to the plaintiffs from the property and money of said defendant, Wiener Bank-Verein, of Vienna, Austria, held by said Thomas W. Miller, as Alien Property Custodian of the United States, and/or Frank White, as Treasurer of the United States, the sum of Fifty thousand, nine hundred nineteen and ninety-seven hun-

225

*Plaintiffs' Notice of Appeal.*

226 dredths dollars (\$50,919.97), with interest thereon from August 12, 1919, at the rate of six per cent. per annum in the sum of Fourteen thousand seven hundred sixty-six and eighty hundredths dollars (\$14,766.80), together with the plaintiffs' costs herein as taxed at \$105.80 within ninety days after the entry of said order, and more particularly so much of said final decree as only allows the plaintiffs to recover the kronen debt in question at an August 12, 1919, rate of exchange between kronen and dollars, and as only allows the plaintiffs interest from August 12, 1919.

227

Dated, New York, August 27, 1924.

Yours, etc.,

STOCKTON & STOCKTON,  
Solicitors for Plaintiffs,  
Office & P. O. Address,  
2 Rector Street,  
New York City.

To:

CLERK UNITED STATES DISTRICT COURT,  
Southern District of New York.

228

WILLIAM HAYWARD, Esq.,  
Solicitor for Defendants,  
Thomas W. Miller and Frank White,  
Post Office Building,  
New York City.

MANHEIM & WACHTELL, ESQS.,  
Solicitors for Defendant,  
Wiener Bank-Verein,  
1328 Broadway,  
New York City.

# **Petition for Appeal of Defendant Bank.**

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

**E. 23-160.**

---

**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,**

**Plaintiffs,**

**—against—**

**THOMAS W. MILLER, as Alien Property Custodian of the United States and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,**  
**Defendants.**

---

*To the Honorable District Judge:*

The above named defendant, Wiener Bank-Verein, of Vienna, Austria, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 24th day of June, A. D. 1924, does hereby appeal from said decree to the Circuit Court of Appeals, for the Second Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed, and that a citation be issued as provided by law, and that a transcript of the record of proceedings and of the documents upon which said decree was based, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, under the rules of such court, in such cases made and provided, and your petitioners further

229

230

231

*Assignment of Errors of Defendant Bank.*

232 pray that a proper order relating to the security to be required of said defendant, if any, be made.

Dated, New York, September 15th, 1924.

MANHEIM & WACHTELL,  
Solicitors for Deft. Wiener Bank-Verein,  
1328 Broadway, New York City,  
Borough of Manhattan.

**Assignments of Error of Defendant Bank.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E. 23-160.

233

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-THAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

234

Defendants.

NOW COMES the above named defendant, Wiener Bank-Verein, of Vienna, Austria, and files the following assignments of error, upon which it will rely upon its appeal from the decree made by this Honorable Court, on the 24th day of June, 1924, in the above entitled cause.

First: That the Court erred in holding that the plaintiffs made a sufficient demand for the balance on deposit with said defendant Bank, on August 12th, 1919.

*Assignment of Errors of Defendant Bank.*

Second: That the Court erred in holding that the cable of August 12th, 1919, was a sufficient demand for such balance on deposit, with said defendant Bank.

235

Third: That the Court erred in holding that the plaintiffs were entitled to recover the kronen balance on deposit, in dollars, at the rate of exchange existing on August 12th, 1919.

Fourth: That the Court erred in holding that the plaintiffs were entitled to recover interest at the rate of six per cent. per annum, from August 12th, 1919.

236

Fifth: That the Court erred in not holding that the plaintiffs had failed and omitted to make any sufficient demand for the balance on deposit.

Sixth: That the Court erred in not holding that the plaintiffs were entitled to recover the amount of the kronen balance in this suit, if at all, at the rate of exchange prevailing at the time of the trial or of the decree.

Seventh: That the Court erred in not holding that no sufficient demand for the balance on deposit having been made, the suit was prematurely brought.

237

Eighth: That the Court erred in not dismissing the bill of complaint.

Dated, New York, September 15th, 1924.

MANHEIM & WACHTELL,

Solicitors for Defendant,

Wiener Bank-Verein,

Office & P. O. Address,

1328 Broadway,

New York City,

Borough of Manhattan.

# **Allowance of Appeal of Defendant Bank.**

238

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

239

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

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Upon reading the petition of defendant, Wiener Bank-Verein, of Vienna, Austria, for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

240

ORDERED that the appeal as prayed for be and it hereby is allowed, and that a certified transcript of the record and proceedings be forthwith transmitted to the Circuit Court of Appeals, for the Second Circuit, and it is

FURTHER ORDERED that the bond on appeal be fixed at the sum of \$250.00.

Dated, New York, September 15th, 1924.

WM. BONDY,  
U. S. D. J.



# **Citation on Appeal of Defendant Bank.**

241

Citation by the Honorable William Bondy,  
U. S. District Judge.

*To Leopold Zimmermann, Louis J. Rees, Maryan  
H. Hauser, John S. Scully, Simon B. Blumen-  
thal, David Forshay and Isaac Gutenstein,  
co-partners doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers, and Thomas W. Miller, as Alien  
Property Custodian of the United States, and  
Frank White, as Treasurer of the United  
States—GREETING :*

242

YOU ARE HEREBY CITED AND ADMONISHED to be  
and appear at a United States Circuit Court of  
Appeals, for the Second Circuit, to be holden at  
the Borough of Manhattan, in the City of New  
York, in the District and Circuit above named,  
on the 15th day of October, 1924, pursuant to  
an allowance of appeal filed in the Clerk's office  
of the District Court of the United States, for  
the Southern District of New York, wherein the  
Wiener Bank-Verein, of Vienna, Austria, are  
appellants and you are the appellees, to show  
cause, if any there be, why the final decree in  
said allowance of appeal mentioned should not be  
corrected, and speedy justice should not be done  
in that behalf.

243

Given under my hand, at the Borough of Man-  
hattan, City of New York, in the District and  
Circuit above named, this 15th day of September,  
in the year nineteen hundred and twenty-four,  
A. D., and the Independence of the United States  
one hundred and forty-ninth.

WM. BONDY,  
U. S. District Judge.

# **Notice of Appeal of Defendant Bank.**

244

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

---

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

245

THOMAS W. MILLER, as Alien Property Custodian of the United States and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,

Defendants.

---

*Sirs:*

246

PLEASE TAKE NOTICE that the above named defendant, Wiener Bank-Verein, of Vienna, Austria, hereby appeals to the Circuit Court of Appeals, for the Second Circuit, from the final decree made and entered on the 24th day of June, 1924, directing that the defendants, Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, pay over to the plaintiffs from the property and money of said defendant, Wiener Bank-Verein, of Vienna, Austria, held by said Thomas W. Miller, as Alien Property Custodian of the United States, and/or Frank White, as Treasurer of the United States, the sum of Fifty thousand, nine hundred nineteen and ninety-seven hundredths dollars (\$50,919.97), with interest thereon from August 12th, 1919, at the rate of six per

*Notice of Appeal of Defendant Bank.*

cent. per annum, in the sum of Fourteen thousand seven hundred sixty-six and eighty hundredths dollars (\$14,766.80), together with the plaintiffs' costs herein as taxed at \$105.80, within ninety days after the entry of said order, and more particularly from so much of said final decree as allows the plaintiffs to recover the kronen debt in question, in currency of the United States of America, at the rate of exchange between kronen and dollars existing on August 12th, 1919, and allows the plaintiffs' interest at the rate of six per cent. per annum, from August 12th, 1919, and fails to dismiss the bill of complaint.

247

248

Dated, New York, September 16th, 1924.

Yours, etc.,

MANHEIM & WACHTELL,

Solicitors for defendant Wiener

Bank-Verein,

Office & P. O. Address,

No. 1328 Broadway,

New York City,

Borough of Manhattan.

To:

CLERK, UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MESSRS. STOCKTON & STOCKTON,

Solicitors for Plaintiffs,

2 Rector Street,

New York City.

WILLIAM HAYWARD, ESQ.,

Solicitor for Defendants Thomas

W. Miller and Frank White,

Post Office Building,

New York City.

249

250 **Petition for Appeal of Defendants Miller and White.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

251 LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

252 Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their solicitor, William Hayward, Esquire, United States Attorney for the Southern District of New York, and conceiving themselves aggrieved by the decree made and entered on the 24th day of June, 1924, in the above entitled cause, do hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they

*Petition for Appeal.*

pray that this appeal may be allowed and that a  
citation be issued as provided by law and that a  
transcript of the record, proceedings and papers  
upon which said order and decree were made,  
duly authenticated, may be sent to the United  
States Circuit Court of Appeals for the Second  
Circuit. 253

WM. HAYWARD,

United States Attorney for the South-  
ern District of New York, Solicitor  
for Thomas W. Miller, as Alien  
Property Custodian, and Frank  
White, as Treasurer of the United  
States. 254

Dated, New York, November 17, 1924.

256 **Assignment of Errors of Defendants Miller  
and White.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

257 LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN  
H. HAUSER, JOHN S. SCULLY, SIMON B. BLU-  
MENTHAL, DAVID FORSHAY and ISAAC GUTEN-  
STEIN, co-partners doing business under the  
firm name and style of Zimmermann & For-  
shay, as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE, as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

258 Now come the defendants, Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, and file the  
following assignment of errors upon which they  
will reply upon their appeal from the decree  
made by this Honorable Court on the 24th day  
of June, 1924, in the above entitled cause.

First: That the Court erred in holding that  
the decree in this cause should be for the value  
in dollars of the marks owing to the plaintiffs  
at the rate of exchange on August 12, 1919.

*Assignment of Errors.*

Second: That the Court erred in not holding that the decree should be for the value in dollars, as of the date of the decree, of the German marks owing to the plaintiffs.

259

Third: That the Court erred in holding that the plaintiffs made a sufficient demand for the balance on deposit with the defendant, Wiener Bank-Verein, on August 12, 1919.

Fourth: That the Court erred in holding that the cable on August 12, 1919 was a sufficient demand for such balance on deposit, with said defendant bank.

260

Fifth: That the Court erred in not holding that, no sufficient demand for the balance on deposit with the said defendant bank having been made, the suit was prematurely brought.

Sixth: That the Court erred in admitting into evidence over the objection and exception of the defendants, plaintiffs' Exhibit 1 (Rec., p. 70).

Seventh: That the Court erred in ordering, adjudging, and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States pay to the plaintiffs the sum of fifty thousand nine hundred nineteen dollars, and ninety-seven cents (\$50,919.97), with interest thereon from August 12, 1919 in the sum of fourteen thousand seven hundred sixty-six dollars and eighty cents (\$14,766.80), together with the costs of this suit out of the property of the defendant alien enemies, conveyed, transferred,

261

*Assignment of Errors.*

262 assigned, delivered, or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant, the Alien Property Custodian, or by the defendant, the Treasurer of the United States, in a trust entitled Wiener Bank-Verein.

Eighth: That the Court erred in not ordering, adjudging and decreeing that the evidence was insufficient to warrant a decree in favor of the plaintiffs.

263 Ninth: That the Court erred in not adjudging, ordering and decreeing that the bill of complaint be dismissed.

All of which is respectfully submitted.

Dated, New York, New York, the 17th of November, 1924.

WM. HAYWARD,  
United States Attorney, Solicitor for  
Thomas W. Miller, as Alien Prop-  
erty Custodian, and Frank White,  
as Treasurer of the United States.



**Order Allowing Appeal of Defendants  
Miller and White.**

265

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

E. 23-160.

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LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H.  
HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners, doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers,

Plaintiffs,

266

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

---

Upon reading the petition of Thomas W. Miller,  
as Alien Property Custodian, and Frank White,  
as Treasurer of the United States, dated New  
York, New York, Nov. 17, 1924, for the allowance  
of an appeal, and on consideration of the Assign-  
ment of Errors presented therewith, it is

267

ORDERED that the appeal as prayed for be and  
the same is hereby allowed and that a certified  
copy of the record and of proceedings be forth-  
with transmitted to the Circuit Court of Appeals  
for the Second Circuit; and it appearing that this  
appeal is taken by direction of a department of

*Citation on Appeal.*

268 the Government, to wit, the Department of Justice, it is further

ORDERED that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, either to prosecute the same or to answer in damages and costs.

269 Dated, New York, New York, November 18, 1924.

HENRY W. GODDARD,  
United States District Judge.

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**Citation on Appeal of Defendants Miller and White.**

By the HONORABLE HENRY W. GODDARD, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

270 *To Leopold Zimmermann, Louis J. Rees, Margan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers—GREETING:*

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden

*Citation on Appeal.*

at the Borough of Manhattan in the City of New York, in the District and Circuit above named on the 17th day of December, 1924, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, are appellants, and you are appellees to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

271

272

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 18th day of November, in the year of our Lord One Thousand Nine Hundred and twenty-four, and of the Independence of the United States the One Hundred and Forty-ninth.

HENRY W. GODDARD,  
United States District Judge  
for the Southern District of New York,  
in the Second Circuit.

273

9

274 **Notice of Appeal of Defendants Miller and White.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

E. 23-160.

275

LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMEN-  
THAL, DAVID FORSHAY and ISAAC GUTENSTEIN,  
co-partners, doing business under the firm  
name and style of Zimmermann & Forshay,  
as brokers,

Plaintiffs,

—against—

THOMAS W. MILLER, as Alien Property Custodian  
of the United States, and FRANK WHITE as  
Treasurer of the United States, and the  
WIENER BANK-VEREIN of Vienna, Austria,  
Defendants.

*To the Clerk of the United States District Court  
for the Southern District of New York.*

276

MESSRS. STOCKTON & STOCKTON,

2 Rector Street,

Borough of Manhattan, New York,

Solicitors for Plaintiffs.

PLEASE TAKE NOTICE that Thomas W. Miller,  
as Alien Property Custodian and Frank White,  
as Treasurer of the United States of America, do  
hereby appeal to the Circuit Court of Appeals for

*Notice of Appeal.*

the Second Circuit from the final decree made and entered on the 24th day of June, 1924, and from each and every part of said decree. 277

Dated, New York, New York, November 17, 1924.

WM. HAYWARD,  
United States Attorney for the  
Southern District of New York.  
Solicitor for Thomas W. Miller,  
as Alien Property Custodian,  
and Frank White, as Treasurer  
of the United States. 278

# **Testimony.**

280

## **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK. In Equity 23-160.**

LEOPOLD ZIMMERMAN, LOUIS J. REES, M. MAX H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners doing business under the firm name and style of Zimmerman and Forshay, as brokers,

Plaintiffs,

281

—against—

THOMAS W. MILLER, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN of Vienna, Austria,

Defendants.

Before—HONORABLE JOHN C. KNOX,

*District Judge.*

New York, November 21st, 1923.

2:00 P. M.

282

### APPEARANCES:

STOCKTON & STOCKTON (Joseph M. Hartfield and Hamilton Vreeland, Jr., Counsel), Solicitors for Plaintiffs,

WILLIAM HAYWARD, U. S. Attorney (Thomas J. Crawford, Assistant U. S. Attorney, Counsel), Solicitor for Defendants Miller and White.

MANHEIM & WACHTELL, Solicitors for Defendant Wiener Bank-Verein of Vienna, Austria.

MARYAN H. HAUSER, called as a witness in  
behalf of the plaintiffs, being first duly sworn, 283  
testifies as follows:

*Direct examination by Mr. Hartfield:*

Q1. What is your full name and your place of residence? A. Maryan H. Hauser, 237 East 120th Street, Rockaway Park, New York City.

Q2. Are you a member of the firm of Zimmerman & Forshay? A. Yes, sir.

Q3. Who are the other partners in the firm? A. Leopold Zimmerman, Louis J. Rees, John S. Scully, David Forshay, Samuel P. Blumenthal and Isaac Gutenstein. 284

Q4. The members of that firm are the plaintiffs in this suit? A. Yes, sir.

Q5. Were these same partners under the firm name of Zimmerman & Forshay on April 6, 1917, and on October 1st, 1917? A. Yes, sir.

Q6. How long has the present personnel of the firm of Zimmerman & Forshay continued? A. Since January 1, 1917.

Q7. And at that time how was the firm changed? A. Gutenstein and Mr. Forshay were admitted to the firm.

Q8. Did all of the former partners continue to be partners after the admission of these two new members on January 1, 1917? A. Yes, sir. 285

Q9. How long had the firm of Zimmerman & Forshay, as it existed on December 31, 1916, been in existence? A. Since March, 1881.

Q10. And had that firm which was formed in March, 1881, succeeded to any other firm doing business in the City of New York? A. It succeeded the firm of Zimmerman, Walsh & Company.

*Margan H. Hauser—for Plaintiffs—Direct.*

286 Q11. When was Zimmerman, Walsh & Company first formed? A. I think in 1874.

Q12. So that it has been continuously in business in this city for about fifty years? A. Yes, sir.

Q13. Was Mr. Zimmerman, of the firm of Zimmerman & Walsh, the same Mr. Zimmerman who is now connected with your firm? A. Yes, sir.

287 Q14. What was the business of the firm, particularly its business on or about January 1, 1917, continuing to and including April 5, 1917? A. General brokerage, stock exchange business, foreign exchange, specie, and so on.

Q15. It did business during all the period you have told us about in the City of New York? A. Yes, sir.

Q16. Where was its office in 1917? A. 9 and 11 Wall Street.

Q17. Where is its place of business now? A. 170 Broadway.

Q18. What part of the business did you have to do with? A. Foreign correspondence.

Q19. You had to do with the foreign department? A. Yes, sir.

288 Q20. Did your firm specialize in foreign exchange and foreign moneys? A. Yes, sir, quite extensively.

Q21. And as a member of the firm, was it part of your business to become familiar with, and were you in fact familiar with the rates of exchange prevailing in the City of New York between Austrian kronen and United States dollars in the month preceding the 6th day of April, 1917? A. Yes, sir.

Q22. Were any of the partners that you have mentioned at any time between April 6, 1917,



*Margan H. Hauser—for Plaintiffs—Direct.*

and August 1, 1919, in any enemy country, any country occupied by an enemy or an ally of an enemy? A. No, sir. 289

Q23. Where were they during all that period? A. Right here in New York City.

Q24. All of the partners were continuously in the United States of America, in the City of New York, during the period of America's participation in the war? A. Yes, sir.

Q25. Are your partners American citizens? A. Yes, sir, all of them.

Q26. Are you an American citizen? A. Yes, sir. 290

Q27. And were you such an American citizen during all the period of our participation in the war? A. Yes, sir.

Mr. Crawford: I may say, Mr. Hartfield, the Government will not raise any question about that.

Mr. Hartfield: I know that, but it is just a formal thing.

Q28. Are all of your partners, including yourself, more than 21 years of age? A. Yes, sir.

Q29. Were you, or any of your partners, during the period of the war, either an officer, official, agent or an agency of any enemy or an ally of an enemy? A. No, sir. 291

Q30. Do you know an institution that did business in the City of Vienna in the country of Austria known as the Vienna Bank Verein? A. Yes, sir.

Q31. Did your firm do business with that bank? A. Yes, sir.

Q32. Is that a State bank or is it a privately owned bank? A. I think it is a privately owned bank.

*Maryan H. Hauser—for Plaintiffs—Direct.*

292 Q33. But it was one of the large banking institutions in Vienna? A. Yes, sir.

Q34. Did you have a deposit account with that firm? A. Yes, sir.

Q35. Did you have such an account on the 6th day of April, 1917? A. Yes, sir.

Q36. Do you know a Mr. Pollock, who was an officer of that bank? A. Yes, sir, director Oscar Pollock.

Q37. You say he was a director of that institution? A. And he is today.

Q38. He is today? A. Yes, sir.

293 Q39. You say director of a foreign bank such as the defendant, Vienna Bank Verein, are directors there active officers? A. Yes, sir.

Q40. And a director of a bank such as the Vienna Bank-Verein has duties similar to a president or vice-president of a New York Banking institution? A. Yes, sir, that is my understanding.

Q41. Are you familiar with the signature and handwriting of Mr. Pollock, who was a director of the defendant bank, and who is now a director of the defendant bank? A. I know Mr. Pollock's signature.

294 Q42. Will you please look at that paper and tell us if that is his signature (handing paper to the witness)? A. Yes, that is his signature.

Q43. Is this a letter received by Zimmerman & Forshay in the mail in due course from Vienna on April 23, 1920, the latter being dated April 1, 1920? A. Yes, sir, received here on April 23, 1920.

Mr. Hartfield: I ask to have this marked for identification.

*Margan H. Hauser—for Plaintiffs—Direct.*

(Marked Plaintiffs' Exhibit 1 for Identification.)

295

Q44. I call your attention to the statement contained in this letter from Plaintiffs' Exhibit 1 for Identification, that "Your pre-war balance held with us as per April 6, 1917, namely, kronen, 3,313,799.03," and ask you if that is the correct amount of the balance due from that institution to you or whether the amount owed to you is less than that sum?

Mr. Crawford: If your Honor please, I want to register an objection. I do not think the question is proper because the paper is not yet in evidence.

296

Mr. Hartfield: I offer it in evidence.

Mr. Crawford: I object to its going into evidence on the ground that it is an attempt to state an account after April 6, 1917.

The Court: I will take it for what it shows itself to be.

Mr. Crawford: Your Honor will allow me an exception?

The Court: Yes.

297

*By Mr. Hartfield:*

Q45. Will you answer the question? A. The amount is less than what this letter says.

Q46. Will you explain why that is? A. This included a transaction of 1,250,000 kronen which we purchased from the representative of the Wiener Bank-Verein in New York and because his cable was not forwarded in time, we cancelled that transaction with him.

Q47. When was this purchase made, before

*Margan H. Hauser—for Plaintiffs—Direct.*

298 America's entrance into the war? A. A few days before.

Q48. And because of the failure to get that cable through, you cancelled it, so deducting 1,250,000 kronen from that balance, what is the amount? A. 2,063,799.03 kronen.

Q49. Has that sum, or any part of it, ever been paid to you? A. No, sir.

299 Q50. Will you tell us, based upon your experience as a dealer in foreign exchange, what was the average rate for kronen in the month immediately preceding the 6th day of April, 1917, the average rate for the month? A. 11.18.

Q51. Have you translated into dollars at 11.18, the number of kronen which you just testified about, namely, 2,063,799.03? A. Yes, sir.

Q52. What do you make that amount? A. I make that in dollars, \$230,732.73.

Q53. Did you cause to be filed on behalf of your client on or about December 15, 1920, notice of the claim with the Alien Property Custodian? A. Yes, sir.

Mr. Hartfield: Have you got that file?

Mr. Crawford: That will be conceded.

300 Mr. Hartfield: I assume, your Honor, without marking it, it being a file paper of the Alien Property Custodian, that the claim filed will be deemed to have been offered in evidence?

Mr. Crawford: No objection.

Mr. Hartfield: And that we may submit to your Honor a copy, first submitting it to the attorney for the Alien Property Custodian?

(Marked Plaintiffs' Exhibit 2.)

*Margan H. Hauser—for Plaintiffs—Cross.*

Q54. Have you computed the interest on that amount from April 1, 1917, to date? A. Mr. Baenziger has it. 301

Q55. Does the amount referred to in that letter of the defendant bank, less this item of 1,250,000 kronen, represent the transaction which was not completed just prior to April 6, 1917; is that the same amount as appears on the books of Zimmerman & Forshay to be due from the defendant company?

Mr. Crawford: I object to that on the ground that the books are the best evidence. 302

*Cross examination by Mr. Crawford:*

XQ56. Mr. Hauser, you have no personal knowledge of the amount that you claim the plaintiffs have against the Wiener Bank, have you? A. I have personal knowledge from what our books show.

XQ57. Then on what did you base your statement to Mr. Hartfield that the amount represented in that letter is correct? A. It is not correct, I beg your pardon.

XQ58. Except with the slight exception that you mentioned? A. That this amount agrees with our books. 303

XQ59. Did you compare it? A. Yes, sir.

XQ60. Did your company ever make a demand upon the Wiener Bank prior to April 6, 1917, for the payment of this balance? A. Prior to April 6?

XQ61. Yes. A. No, sir.

Mr. Hartfield: Your Honor understands that the Bank in its answer admits

*Margan H. Hauser—for Plaintiffs—Cross.*

304

the amount as we allege in our complaint as being due from the Bank, and I understood from Mr. Stanley that while he wanted us to make formal proof of the complaint, that he had no information that the amount was incorrect.

The Court: Do you require them to produce their books to show what their books indicate as coming to them?

305

Mr. Crawford: Mr. Stanley was called to Washington last night. I understood from him that we did not stand on technical proof, but on the other hand, we did want some evidence to show what this balance was, and competent evidence. I do not think the witness's statement that the amount compares with the books measures up to that.

The Court: I do not suppose the books will show anything different.

*By Mr. Crawford:*

306

XQ62. Have you compared the books of the company in connection with this account? A. At the time we filed our claim with the Alien Property Custodian, we made it up from our books, and it agrees with their letter which they admit except that 1,250,000.

XQ63. It is exact as to that amount? A. Yes, sir, to the penny.

Mr. Crawford: Then, if your Honor please, I will not insist upon it.

*Maryan H. Hauser—for Plaintiffs—Re-direct.*

*Re-direct examination by Mr. Hartfield:*

307

RDQ64. Do you know Mr. Von Fest? A. Yes, sir.

RDQ65. Do you know his full name? A. I do not know his first name.

RDQ66. What is his business in this country? A. He is representative of the Wiener Bank-Verein in New York.

RDQ67. When did he first come to New York? A. Long before the war.

RDQ68. Was he here in the months of January, February, March and April of 1917? A. Yes, sir.

308

RDQ69. And did he continue here after that time? A. Yes, sir.

RDQ70. Did you, in your business with the Wiener Bank-Verein, frequently come in contact with him? A. Yes, sir.

RDQ71. And did you transact business with him on behalf of the Wiener Bank-Verein? A. Yes, sir.

RDQ72. What was the nature of the business you transacted with him? A. We bought exchange from him which we received from the Wiener Bank-Verein. We credited and paid him the dollars or paid them to some institution he named.

309

RDQ73. In other words, he gave you instructions on behalf of the Wiener Bank-Verein both with respect to matters appearing on the debit and credit side of this account? A. Some of them, yes, sir.

Mr. Hartfield: If your Honor please, I will put Mr. Baenziger on to prove this computation.

310 BRUNO BAENZIGER, called as a witness in behalf  
of the plaintiffs, having been first duly sworn,  
testifies as follows:

*Direct examination by Mr. Hartfield:*

Q1. This notice of claim, which will be treated  
as Exhibit 2, is produced by the Alien Property  
Custodian. It is dated December 13, 1921, and  
shows that it was received and entered in the  
Bureau of Law Registry of Claims, Book 2, page  
113, December 21. Mr. Baenziger, you are em-  
ployed by Zimmerman & Forshay, the plaintiff in  
this case? A. Yes, sir.

311 Q2. You knew the nature of their business in  
1917 and prior thereto? A. Yes, sir.

Q3. What was the business they were engaged  
in? A. In the brokerage business and foreign  
exchange.

Q4. Did they specialize in currency of foreign  
countries and in foreign exchange? A. Yes, sir.

Q5. You knew that they had an account with  
the Wiener Bank-Verein, the defendant bank, in  
Vienna, in the country of Austria? A. Yes, sir.

312 Q6. Do the books of Zimmerman & Forshay  
show a balance in its favor as of the 6th day of  
April? A. Yes, sir.

Q7. Did you have anything to do with the  
bookkeeping on the 6th day of April, 1917? A.  
Not with that account.

Q8. But you have since examined it? A. Yes,  
sir.

Q9. Are you able to state whether or not the  
amount as appears upon the books of Zimmerman  
& Forshay is in all respects the same as the  
amount set forth in Plaintiffs' Exhibit 1, the



*Bruno Baenziger—for Plaintiffs—Direct.*

letter from the defendant bank, except as to this 313  
item of 1,250,000 kronen? A. Yes, sir.

Q10. Have you now computed interest at six  
per cent. from the 6th day of April, 1917, upon  
the sum of \$230,732.73, the equivalent at 11.18  
cents in United States currency for each Austrian  
kronen upon 2,063,799.03 kronen? A. The in-  
terest at the rate of six per cent. amounts to  
\$90,601.05.

Q11. And adding that to the principal, making  
a total of what? A. \$321,333.78.

Q12. Have you also computed the interest at  
the rate of five per cent. per annum? A. The 314  
interest amounts to \$75,500.88.

Q13. And principal? A. \$306,233.61.

Q14. That is the total, is it? A. That is the  
total, together.

Q15. That is, adding the principal and interest  
makes that total? A. Yes, sir.

Q16. The interest you have computed down to  
date? A. As of Monday.

Q17. Which is the 19th? A. Yes, sir.

Mr. Hartfield: We also want to put in  
evidence, your Honor, the exhibit dated 315  
June 3, 1922, being the certificate of the  
Secretary of State signed by Mr. Alvey A.  
Adee, the Assistant Secretary of State, to  
the effect that the United States has not  
given to the Government of Austria the  
notice contemplated by paragraph 14 of the  
Annex to Section 4 of the Treaty of St.  
Germain, and also contains the same pro-  
vision in the Treaty of Versailles. It is  
Plaintiffs' Exhibit 9 in the other case. I

*Colloquy of Counsel.*

316 suppose we may call it the same exhibit number in this case?

The Court: We had better make it a different one in this case.

(Marked Plaintiffs' Exhibit 3.)

Mr. Hartfield: Plaintiff rests.

(*Prima facie* proofs closed.)

317 Mr. Crawford: The Government has no evidence to offer. I understand that the questions of law involved in this and the other case are to be argued at a date to be set by your Honor.

The Court: I understand that the Wiener Bank-Verein does not offer any proof as against the allegations contained in the complaint.

Mr. Hartfield: They have put in an answer in which they do not deny the amount of kronen they owe us, but they do put in issue the question of whether they should pay kronen as of the value of the date of judgment or kronen as of the value of April 6th.

318 Mr. Crawford: If your Honor please, I want to straighten out the record, that I did not object to any of this computation of interest; that is not without prejudice to our right to raise the legal question involved.

The Court: I understand. I will withhold the decree as against the Bank-Verein until the argument.

CASE CLOSED.

**Plaintiffs' Exhibit 1.**

319

**WIENER BANK-VEREIN**

Capital fully paid up and Reserves Kronen  
250 millions.

**HEAD OFFICE VIENNA**

Cable-Address: Bankverein Vienna

Agencies at  
Agram (Zagreb)  
Aussig a. / E.  
Bieltz-Biala  
Bodenbach  
Bozen  
Brunn  
Budapest  
Budweis  
Czernowitz  
Graz  
Iglau  
Innsbruck  
Jagerndorf  
Karlsbad  
Klagenfurt  
Krakau  
Lemberg  
Mahr.-Ostrau  
Marienbad  
Meran  
Olmütz  
Pardubitz  
Pilsen  
Prag  
Prossnitz  
Salzburg  
St. Polten  
Teplitz  
Teschén  
Tetschen  
Troppau  
Villach  
Wr.-Neustadt

320

321

**Agencies in Turkey:**

Constantinopel  
Smyrna

Sp

Foreign Department

*Plaintiffs' Exhibit 1.*

322

Received M. H. H. Apr 23 1920

Ans'd Jul 20 1920

Vienna, April 1st, 1920.

1, Schottengasse 6.

Messrs. Zimmermann & Forshay,  
New York.

Dear Sirs,

Re: Your pre-war balance with us.

323

We duly received your favour of 17th ult., contents of which had our careful attention in all its details and in reply we beg to state the following:

324

To begin with, we would point out to you that your presumption that it must have been as well known to us as it was to you, that your pre-war balance, namely your balance with us as per April 6th 1917, could not have been touched by either party and was tied up, is an erroneous one, as contrary to the regulations in Germany, there was at no time during the war or afterwards a prohibition in Austria to effect payments on behalf of Americans out of the balances kept here, and for instance, as you will have noticed from our correspondence, we never discontinued our payments to Mr. Martin Teschner, in whose favour a monthly credit had been opened by your radio of September 18th 1916.

In consequence hereof we effected, as a rule, during the whole war any payments for our American clients which had been ordered to us, and when in April 1919 postal relations were resumed, we continued the accounts kept with us without

*Plaintiffs' Exhibit 1.*

making any distinction between pre-war balances and new balances. 325

While from the details of your letter we have gained the conviction that you were really in the belief that your pre-war balance must remain intact and was subject to the provisions of the Peace-Treaty, and that only therefore, you made to us large remittances when business-relations were permitted again, notwithstanding the fact that you kept with us at that time a big old Kronen balance, we could not know this at the time and believed that your remittances had only the purpose to create a balance of new Kronen, the old Kronen kept with us having ceased to be legal tender after the restamping in March 1919. 326

As on the other hand a good many of our American clients had instructed us already in Spring and Summer 1919 to effect payments out of these old Kronen balances by exchanging same into new Kronen, we could but interpret your cable of August 15th, reading:

"Fifteenth credit Credit Suisse Zurich five million old Kronen against five million new Kronen stop exchange our balance into new Kronen," to mean that you wish to exchange your whole old Kronen balance with us into new Kronen, as according to our books you had no pre-war balance but only an old Kronen and a new Kronen balance. 327

With regard to your first cable to us of August 6th, reading:

"Referring to our old balance will you consent to American Alien Property Custodian paying us out of your former funds in his custody equivalent in dollars at March fifteenth nineteen

*Plaintiffs' Exhibit 1.*

328 seventeen rate of eleven eighteen stop if you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you stop this will obviate lawsuit which we otherwise be compelled to institute."

we beg to call your attention to the fact that same was absolutely incomprehensible to us, as at that time, we never thought it possible that the Peace Conference would demand that pre-war balances will have to be settled at the pre-war rate of exchange.

329 We, therefore, could not grasp the meaning of your message and cabled you on August 12th in reply as follows:

"Your cable regarding our consent to custodian incomprehensible wire details and reasons and transactions concerned,"

to which cable we never received a reply from you, and strange to say you omitted also to mention same in your favour of February 17th 1920 in which you gave the entire history of the transaction.

330 For your guidance we beg to hand you enclosed copy of our respective cable-confirmation of August 12th 1919.

If you would have answered to this cable, giving us the explanations required, no misunderstanding with regard to the exchange of your pre-war balance could have taken place, and, therefore, you cannot blame us for same now.

As the situation is at present, we are much to our regret not in a position to comply with your wishes and to reverse all our entries in order to re-establish the balance of April 1917, the whole

*Plaintiffs' Exhibit 1.*

account being in a great mix-up and all entangled, a great many of your pre-war orders having been executed against your German-Austrian Kronen account and a good many after-war orders having been effected against your old Kronen account, so that it is very hard to ascertain now which is which.

331

Besides we would mention in case your old Kronen balance with us would *not* have been exchanged into new Kronen, we would have had to deposit same with the Local Law Court, here, so as to protect us against any possible claim against us, as according to § 1425 of the Civil Law Code a debtor in this country is entitled to liberate himself of any debt by depositing the amount involved with the Local Law Court as trustee.

332

This has been done by us and by *all* banks, here, with regard to all balances which have not been exchanged with the consent of the owner and in this case your funds would have been tied up and you would have had to deal with the Local Law Court instead of with us.

As it transpires, however, from your lines that you absolutely insist upon re-establishing your pre-war balance with us in order to file your claim against us, we have made up our mind to comply with your wishes in such a way as to take the amount of your pre-war balance held with us as per April 6th 1917, viz.

333

*K 3,313,799.03*

to exchange this amount into old (unstamped) Kronen and to deposit same now with the Local Law Court here on your behalf, *debiting* you at the same time for its par value on your *German-*

*Plaintiffs' Exhibit 1.*

334 *Austrian Kronen account with us Value April 1st 1920.*

You will understand that you compelled us to do this for our own protection in view of the standpoint you took in this matter. We deemed it, however, advisable to inform you hereof by our to-day's cable reading as follows:

335 "Yours February seventeenth depositing your prewar balance per April sixth 1917 old Kronen threemillions threehundredthirteenthousandsevenhundredninetynine with local lawcourt as trustee debiting thereagainst newkronen account same amount letter follows."

for the cost of which we are *debiting* you with

*K 1.075.—Value April 1st*

on your *German-Austrian Kronen account.*

Much as we would like to maintain with you the pleasant business-relations, which always existed between us, and though we feel with pleasure disposed to be of assistance and service to you, whenever possible, you will understand that we would jeopardize our own interest, if we would comply with your request and sign the  
336 two forms of assent which you intend to send to us in order to be in a position to file an amended claim against us.

Do you really think that we ought to be made responsible for the war and the depreciation of the Kronen currency?

Should you, however, after receipt of this letter and reconsideration of the foregoing change your standpoint and prefer to leave the matter as it was before we made the deposit to the court, we would feel gladly disposed to recall the



*Plaintiffs' Exhibit 2.*

amount involved from the Local Law Court on 337  
 your behalf, re-exchange it again into new Kronen  
 and credit your German-Austrian Kronen ac-  
 count again.

We would do this, however, only upon your  
 special instructions to this effect and are enclos-  
 ing for this purpose a letter addressed to the  
 Local Law Court where your money is deposited,  
 authorizing us to withdraw the funds from them  
 in your favour. Therefore, should you think it  
 desirable please sign the enclosed letter and re-  
 turn it to us with the necessary instructions so  
 as to enable us to do the needful and to act on 338  
 your behalf.

Trusting to receive from you soon a favour-  
 able reply on the subject, we beg to remain, Dear  
 Sirs,

Yours very truly,

WIENER BANK-VEREIN.

2 enclos.

*Registered*

(Two signatures)

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**Plaintiffs' Exhibit 2.**

ALIEN PROPERTY CUSTODIAN 339  
 Notice of Claim Pursuant to Section 9 of  
 "Trading With the Enemy Act."

INSTRUCTIONS.

Notice of claim, under oath, must be executed  
 in duplicate by claimant and filed with the Alien  
 Property Custodian, attention of Bureau of Law,  
 Washington, D. C.

*Plaintiffs' Exhibit 2.*

340 If claimant makes application to the Attorney General, in pursuance of sec. 9 of the "Trading with the enemy Act," and the Presidential Executive Orders thereunder, for the payment, conveyance, transfer, assignment, or delivery to said claimant of money or other property held by the Alien Property Custodian, he must append to his application to the Attorney General a sworn copy of this notice of claim.

Each individual claim must be presented on a separate form.

341 Section 2 of the "Trading with the enemy Act" defines "enemy" and "ally of enemy" as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

342 "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

*Plaintiffs' Exhibit 2.*

“(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term ‘enemy.’” 343

“The words ‘ally of enemy,’ as used herein, shall be deemed to mean—” 344

“(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.” 345

“(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

“(c) Such other individuals, or body or class of individuals, as may be natives,

*Plaintiffs' Exhibit 2.*

346 citizens, or subjects of any nation which is  
an ally of a nation with which the United  
States is at war, other than citizens of the  
United States, wherever resident or wher-  
ever doing business, as the President, if he  
shall find the safety of the United States  
or the successful prosecution of the war  
shall so require, may, by proclamation, in-  
clude within the term 'ally of enemy.' "

The Presidential Proclamation of February 5,  
1918, in pursuance of section 2 (c) of the act, in-  
347 cluded within the meaning of the word "enemy,"  
for the purpose of the "Trading with the enemy  
Act":

"All natives, citizens, or subjects of the  
German Empire or of the Austro-Hun-  
garian Empire who, by virtue of the provi-  
sions of sections four thousand and sixty-  
seven, four thousand and sixty-eight, four  
thousand and sixty-nine, and four thousand  
and seventy, of the Revised Statutes, and of  
the proclamations and regulations there-  
under, have been heretofore or may be here-  
after transferred after arrest into the cus-  
348 tody of the War Department for detention  
during the war."

Section 9 of the "Trading with the enemy Act"  
is as follows:

"Sec. 9. That any person, not an enemy,  
or ally of enemy, claiming any interest,  
right, or title in any money or other prop-  
erty which may have been conveyed, trans-  
ferred, assigned, delivered, or paid to the

*Plaintiffs' Exhibit 2.*

alien property custodian hereunder, and 349  
held by him or by the Treasurer of the  
United States, or to whom any debt may be  
owing from an enemy, or ally of enemy,  
whose property, or any part thereof, shall  
have been conveyed, transferred, assigned,  
delivered, or paid to the alien property  
custodian hereunder, and held by him or  
by the Treasurer of the United States, may  
file with the said custodian a notice of his  
claim under oath and in such form and con-  
taining such particulars as the said custo-  
dian shall require; and the President, if 350  
application is made therefor by the claim-  
ant, may, with the assent of the owner of  
said property and of all persons claiming  
any right, title, or interest therein, order  
the payment, conveyance, transfer, assign-  
ment, or delivery to said claimant of the  
money or other property so held by the  
alien property custodian or by the Treas-  
urer of the United States or of the inter-  
est therein to which the President shall de-  
termine said claimant is entitled: *Pro-*  
*vided*, That no such order by the President 351  
shall bar any person from the prosecution  
of any suit at law or inequity against the  
claimant to establish any right, title, or  
interest which he may have in such money  
or other property. If the President shall  
not so order within sixty days after the  
filing of such application, or if the claim-  
ant shall have filed the notice as above re-  
quired and shall have made no applica-  
tion to the President, said claimant may,

*Plaintiffs' Exhibit 2.*

352

at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

353

354

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

*Plaintiffs' Exhibit 2.*

The Executive Order of October 12, 1917, provides, among other things, as follows: 355

“XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provision of Section 9 of the ‘Trading with the enemy Act.’”

TO FRANCIS P. GARVAN,  
Alien Property Custodian,  
Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the “Trading with the enemy Act,” hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require. 356

1. Name of claimant (individual, partnership, association, corporation):

Zimmermann & Forshay.

2. Address of claimant:

170 Broadway, New York City.

3. Name of enemy or ally of enemy whose property is affected by this claim: 357

Wiener Bank-Verein.

Vienna, Austria.

4. Residence or last known address of enemy or ally of enemy:

5. Name of any other persons, if known to

*Plaintiffs' Exhibit 2.*

358 claimant, who have any interest whatever in  
within claim:

None.

6. Address or addresses of such person or persons:

.....

7. If the claim, notice of which is hereby given,  
is made for certain specific property, or for an interest in property, the following questions must  
be answered:

359

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:

.....

Address: .....  
(No.) (Street.) (City.) (Country.)

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property):

360

.....

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)



*Plaintiffs' Exhibit 2.*

Money owed to claimant by abovementioned enemy, or ally of enemy, as follows: \$391,028.29 with interest thereon at the rate of six per centum (6%) per annum since April 6, 1917.

361

This debt arises from a pre-war balance which claimant had with abovementioned enemy or ally of enemy and which said enemy or ally of enemy now owes this claimant, figured at the rate of exchange between March 6th and April 6th, 1917, of 11.80 cents in U. S. currency for each Austrian krone.

There are no set-offs or counterclaims in favor of said enemy or ally of enemy. Evidence of this debt will be submitted in the near future.

362

The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

363

Dated, December 13, 1921.

(Signature of party making claim)

(Sd) ZIMMERMANN & FORSHAY.

By MARYAN H. HAUSER, Partner.

(SEAL)

*Plaintiffs' Exhibit 2.*

- 364 (Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)
- 

AFFIDAVIT OF MEMBER OR REPRESENTATIVE OF  
PARTNERSHIP MAKING CLAIM.

State of New York,  
County of New York—ss.:

- 365 I swear that I am a member of the partnership making foregoing claim, and that the foregoing statements are true and correct.

(Sd) MARYAN H. HAUSER.

Subscribed and sworn to before me  
this 13th day of December, 1921.

(Sd) ELIAS GOLDSCHMIDT,  
Notary Public,  
N. Y. Co. Clerk's No. 255.

**Plaintiffs' Exhibit 3.**

367

**DEPARTMENT OF STATE****WASHINGTON**

Address Official Communications to the Secretary  
of State, Washington, D. C.

In reply refer to  
So-763.72113/1584

June 3, 1922.

Mr. Hamilton Vreeland, Jr.,  
Care of Messrs. Stockton and Stockton,  
2 Rector Street,  
New York City, New York.

368

Sir:

In response to the inquiry contained in your letter of May 16, 1922, you are informed that the Government of the United States has not given to the Government of either Austria or Germany the notice contemplated by paragraph 14 of the Annex to Section IV (Property, Rights and Interests) of the treaties of St. Germain and Versailles, respectively.

369

This paragraph in each treaty, in substance provides that in the settlement of matters provided for in the first article of Section IV of Part X of that treaty between the particular enemy state and an Allied or Associated Power which has not given notice of its intention to adopt Section III (Debts) of the treaty, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to

*Plaintiffs' Exhibit 3.*

370 be made and the rate of exchange and of interest shall apply unless the Government of the particular Allied or Associated Power concerned shall within six months of the coming into force of the treaty give notice that the said provisions are not to be applied.

I am, Sir,

Your obedient servant,

For the Secretary of State:

371 **ALVEY A. ADEE,**  
Second Assistant Secretary.

372

**Stipulation as to Transcript of Record.**

373

**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****E—23-160.**


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**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,**

**Plaintiffs,****—against—**

374

**THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,**

---

**Defendants.**

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled suit as agreed on by the parties for the purposes of the appeals herein.

Dated. New York, November 28th, 1924.

375

**STOCKTON & STOCKTON,****Solicitors for Plaintiffs.****MANHEIM & WACHTELL,****Solicitors for Defendant Wiener Bank-Verein.****WM. HAYWARD,**

**Solicitor for Defendants Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States.**

**Clerk's Certificate.**

376

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.  
E—23-160.**

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**LEOPOLD ZIMMERMANN, LOUIS J. REES, MARYAN H. HAUSER, JOHN S. SCULLY, SIMON B. BLUMENTHAL, DAVID FORSHAY and ISAAC GUTENSTEIN, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers,**

**Plaintiffs,**

**—against—**

377

**THOMAS W. MILLER, as Alien Property Custodian of the United States, and FRANK WHITE, as Treasurer of the United States, and the WIENER BANK-VEREIN, of Vienna, Austria,**

**Defendants.**

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378

I, ALEX GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of said District Court in the suit entitled Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay, and Isaac Gutenstein, co-partners, doing business under the firm name and style of Zimmermann & Forshay, as brokers, Plaintiffs, against Thomas W. Miller, as Alien Property Custodian of the United States, and Frank White, as Treasurer of the United States, and the Wiener Bank-Verein of Vienna, Austria, Defendants, as agreed on by the parties on the appeal by the plaintiffs and the cross-appeals by the defendants.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at my office this 28 day of November, 1924.

ALEX GILCHRIST, JR.,

Clerk.

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

Before: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon.  
Learned Hand, Circuit Judges

LEOPOLD ZIMMERMANN et al., Trading as Zimmermann & Forshay,  
Plaintiffs-appellants-appellees,

vs.

FREDERICK C. HICKS, Alien Property Custodian, FRANK WHITE,  
Treasurer of the United States, and the Deutsche Bank, Defend-  
ants-appellees-appellants

The Same

vs.

FREDERICK C. HICKS, Alien Property Custodian, FRANK WHITE,  
Treasurer of the United States, and the Wiener Bank-Verein, De-  
fendants-appellees-appellants.

OPINION

These suits, under Section 9 of the Trading with the Enemy Act, are alike in outline, were tried and argued together, and will be similarly disposed of.

Both proceedings were begun against Mr. Thomas W. Miller as Alien Property Custodian. Mr. Hicks has been substituted on appeal, he having been appointed vice Miller resigned pendent lite.

Subpoenas in each case issued February 28, 1922, and in each the plaintiffs pleaded a demand for the amount in suit made upon the Custodian pursuant to Section 8 of the Statute in December, 1921. No other demand was pleaded.

Deutsche Bank was and is a well known banking institution of Germany, and Wiener Bank did a like business in Austria. In each of these banks plaintiffs had maintained for years before the outbreak of the World War in August, 1914, a large deposit account. Though the methods in which depositors' accounts were availed of in Germany and Austria differed and differ somewhat from methods pursued in the United States, the differences existing give rise to no legal question important in these litigations.

Almost immediately after August, 1914, mail communication between America and the Central Powers became so difficult (owing to the British blockade) that there was practically no exchange of information or instruction between plaintiffs and these banks. For the purposes of these litigations the deposit accounts remained substantially intact until this country entered the War on April 6, 1917, and until the passage of the Trading with the Enemy Act.

Mail communication was resumed rather early in 1919, and the material events of that year will be stated in the opinion following.

During War with the United States the German Empire created an official (der Treuhänder) somewhat resembling the Alien Property Custodian, who, however, did not remove from Deutsche Bank the deposit of plaintiffs, but did lay a species of embargo or injunction upon any payments to or for account of plaintiffs upon said deposit. This embargo was not raised until December, 1921.

Austria never forbade any dealings with or for account of Americans during the War. In 1919 the currency or legal tender of both Germany and Austria was rapidly depreciating in exchange value and efforts (hereinafter detailed) were made by plaintiffs to reach some satisfactory utilization of their still existing deposit accounts in the two banks.

These efforts failed. As to the Wiener Bank, at some time prior to April 1, 1920, plaintiffs refused to accept the Austrian kronen on deposit with that bank to the credit of plaintiffs, who refused either the kronen in kind or United States currency at the then prevailing rate of exchange; they demanded the exchange value of kronen at the rate prevailing immediately before hostilities declared.

There then was in force a provision of Austrian statute law as follows:

"If a debt cannot be paid because the creditor is \* \* \* dissatisfied with the offer \* \* \* the debtor may deposit in court the subject matter in dispute. \* \* \* If legally carried out and the creditor has been informed thereof (this measure) discharges the debtor of his obligation and places the subject matter delivered at the risk of the creditor."

On April 1, 1920, Wiener Bank deposited the number of kronen here in suit in a Court appropriate for that purpose under the statute cited, and gave notice to plaintiffs of what it had done.

Deutsche Bank was compelled by the action of the Treuhänder to retain possession of the marks on deposit with it to the credit of plaintiffs until December, 1921, or substantially the time when these suits were suggested, although not technically begun by the filing of the pleaded notices with the Alien Property Custodian.

Plaintiffs' position throughout in both cases has been and is what they are entitled to recover the dollar value on April 6, 1917, of the German marks and Austrian kronen on deposit with the respective defendant banks.

This measure of recovery was denied below, but plaintiffs were given decrees on the theory that they had demanded payment of each of the defendant banks in August, 1919. From decrees accordingly all parties appealed.

Joseph M. Hartfield for plaintiffs;

Dean Hill Stanley for Alien Property Custodian and the Treasurer of the United States;



Thomas J. Haight and Amos J. Peaslee for Deutsche Bank;  
 Louis Manheim and Samuel R. Wachtell for Wiener Bank;  
 Spier Whitaker filed brief as *amicus curiæ* as to the rate of exchange applicable.

HOUGH, C. J.:

There are several matters discussed at bar as to which discussion in this court may cease; we have expressed views which will remain in force until corrected by higher authority.

War between the United States and Germany ceased on July 2nd, 1921 (Re Miller, 281 Fed., 764; c. f. Swiss National Ins. Co. vs. Miller, U. S. Sup. Ct., Feb. 2, 1925). Undoubtedly commercial relations were more or less re-established for approximately two years before that date, but that fact does not affect the material point that until July 2, 1921, a German was an alien enemy.

The date at which exchange is to be computed we have covered in Guinness vs. Miller, 299 Fed., 538, and sufficiently assigned reasons for our holding.

That the provisions of the Versailles Treaty do not affect nor relate to claims like that against the Deutsche Bank we have also held in the Guinness case, *supra*.

It is fundamental in both these suits to ascertain and declare the legal relation between plaintiffs and the defendant Banks. It was admittedly that of depositor and banker, and there is no evidence that the nature of that common relation is not the same under German, Austrian and American law.

It is therefore so plain as to need no citation in support that the relation of parties was merely that of debtor and creditor, the debt due on demand and therefore not due until demand was made; and a demand is "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting". (Bouv. Law Dic.)

It is useful next to inquire by the law of what country the mutual rights and privileges of the parties are to be determined. We have no doubt that by specific agreement the duties and obligations of the Banks were to be determined by German and Austrian law respectively. But even without such agreement, since each Bank had in effect made a contract to pay on demand and at its own banking house, the same result is reached by applying the familiar rule of the law of the place where the contract is to be performed, i. e. Germany or Austria as the case might be. (London Assurance vs. Companhia, 167 U. S., 149).

The above holding is made in both of these suits, though, as will appear, it is not from our standpoint material in respect of the Deutsche Bank, but it does greatly affect that of the Wiener Bank.

The question which most practically and very vitally affects these suits and probably many others, may be thus put: What did the Banks owe plaintiffs? In answer we think it plain that they did not owe a certain number of units of any fixed value, nor could their debts be expressed in any universal currency; they owned only cer-

tain quantities of the thing called money within that political subdivision of the world in which the Bank existed and to the laws of which it was subject. Therefore neither of these banks ever owned the plaintiffs any dollars. The only method of describing their debts is to speak of so many marks or kronen, which, like dollars, are merely legal and financial entities varying in exchange or purchasing power for reasons with which no Court has any concern and over which it has no power or authority.

Therefore all that any American Court can do is to translate a demand for marks or kronen into the dollars with which alone can we deal; and we must make that translation according to the facts as proven at a time fixed by law, and what that time is we have declared in the Guinness case, *supra*.

Since, therefore, there can be no breach of contracts such as those at bar until a demand and refusal and no assessment of damages in dollars until such demand, the question of fact is acute. When did plaintiffs make a demand upon these banks or either of them?

We may premise this inquiry by stating our agreement with the lower Court in rejecting plaintiffs' contention that their rights were created by the declaration of war on April 6, 1917, i. e. that such declaration was equivalent to a demand and refusal. We feel assured that the declaration had no such effect. Of course a declaration of war could do no more than the war itself, and that war does not affect the relations of parties to an executed contract, but merely suspends the remedies available thereunder, was fully held in *Hanger vs. Abbott*, 6 Wall., 532.

It is indeed obvious that if the results of the declaration of April 6, 1917 were what plaintiffs claim, Section 8 of the Trading with the Enemy Act is quite superfluous, for that statute creates a method of making a demand which admittedly these plaintiffs complied with and no reason for such a proceeding can be found if the declaration was in and of itself a demand by every American creditor upon every alien enemy debtor.

On this point of demand the evidence compels us to disagree with the Court below. Passing the point that no demand was pleaded other than those of December 15, 1921 on the Custodian, it is argued that plaintiffs did in legal effect make several earlier demands, viz: in March, 1919, by filing documents with the Custodian, and in August, 1919, by an interchange of letters and telegrams with both Banks.

It would serve no useful purpose to recite the lengthy statutory demands of March, 1919; suffice it to say that we are convinced that all these documents related to the property of customers or clients of Zimmermann & Forshay which had either been impounded by the German authorities or lost track of in the fog of silence which had enveloped the Austrian Bank. It is impossible to find in these documents any evidence of a demand for plaintiffs' own deposit account.

We are confirmed in this result by observing that as to each bank account, as soon as commercial relations were re-established plaintiffs expressed the desire to go on with pre-war business and maintain

their old deposit accounts; and these desires were expressed after March, 1919.

Again in August, 1919, plaintiffs sent to each Bank telegrams substantially as follows:

"Regarding our old balance will you consent that Alien Property Custodian pay out of your firm funds in his custody equivalent in dollars at March 15, 1917 rate. \* \* \* If you agree wire us to that effect and we will send you necessary papers to be filled out and signed by you. This will obviate lawsuit which we otherwise will be compelled to institute."

This was not a demand for plaintiffs' deposit accounts. It certainly, as was remarked by the Court below, lacks some of the elements of a demand. We think it lacks too many to be a demand at all. What plaintiffs were entitled to were marks or kronen payable in Germany or Austria; what they asked for was the defendants' cooperation in their getting a certain number of dollars out of the Alien Property Custodian.

In the case, therefore, of the Deutsche Bank (and here the cases of the two Banks diverge) we are constrained to the conclusion that the only demand for this deposit accounts was the one pleaded in the bill, i. e. of December 1921; so that plaintiffs can recover only the number of marks sued for and agreed upon at the rate of exchange of the date of demand, i. e. said December.

But in respect of the Deutsche Bank, that concern had a deposit account with plaintiffs in like manner and for the same purposes that plaintiffs had their deposit account in Germany. By amendment duly allowed, Deutsche Bank has pleaded this deposit as a set-off, and also similarly pleaded indebtedness arising on new and wholly different banking transactions between itself and Zimmermann & Forshay amounting to a considerable sum of money.

The Court below allowed as an offset Deutsche Bank's bank balance with Zimmermann & Forshay as the same existed on April 6, 1917; but refused to permit any further offsets through arising out of banking transactions of a somewhat similar nature.

In this we think error was committed. At law a set-off is known to be of comparatively recent statutory origin, but law derived its whole doctrine from equity, and this suit is governed by equitable principles. One of those principles is to ascertain what was due by one party to the other at the commencement of the suit, so that, generally speaking, one party should be prevented from asserting offsets arising after suit began. (*Holden vs. Gilbert*, 7 Paige, 208; *Pate vs. Gray*, F. C. 10794a.) The record does not inform us how much of defendants' offsets were due and payable on or before February 28, 1922. Therefore in the case of the Deutsche Bank the decree must be reversed and the cause remanded, with directions to strike an account as of February 28, 1922, between the parties and to grant plaintiffs recovery for whatever excess there may be in its favor,—plaintiffs' claim being, of course, liquidated at the rate of exchange of December, 1921.

In the case of the Wiener Bank the foregoing recital of facts shows

that no demand had been made prior to April 1, 1920. But there had arisen a difference of opinion as to the rate at which plaintiffs' old account would be available for exchange. Therefore, as we have held that these parties were subject to the operation of Austrian law, payment into Court of all the kronen due was a complete extinguishment of plaintiffs' demand on the Wiener Bank.

Let the decree in that case be reversed and the cause remanded, with directions to dismiss the bill. The Wiener and Deutsche Banks will recover the costs of this Court. No other costs here. The costs of the District Court are left to the discretion of that tribunal.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

LEOPOLD ZIMMERMAN, et al., Plaintiffs-Appellants,

v.

FREDERICK W. HICKS, as Alien Property Custodian; FRANK WHITE, as Treasurer, etc., and WIENER BANK-VEREIN, Defendants-Appellants

JUDGMENT—Filed May 11, 1925

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs to the Wiener Bank-Verein, and cause remanded with instructions to dismiss the bill with costs to the Wiener Bank-Verein.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M.

L. H.

[File endorsement omitted.]

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL

The above named plaintiffs, Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David

Forshay and Isaac Gutenstein, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit and that a final decree therein has been rendered on the 11th day of May, 1925 reversing the decree of the District Court of the United States for the Southern District of New York entered June 24, 1924, directing the dismissal of the bill of complaint with costs and directing that a mandate issue to said United States District Court in accordance with said decree.

The matter in controversy in said suit exceeds one thousand dollars besides costs.

The above entitled cause is one in which the jurisdiction of the United States Circuit Court of Appeals is not final, as the action is brought under and involves a construction of a statute of the United States, to wit: the "Trading with the Enemy Act" (40 Stat. 419), and the cause is a proper one to be reviewed by the Supreme Court of the United States on appeal.

Your petitioners are aggrieved by said decree of said United States Circuit Court of Appeals for the Second Circuit in so far as said decree reverses the decree of the District Court of the United States for the Southern District of New York, entered June 24, 1924, and directs the dismissal of the bill of complaint and does not modify said decree by directing that the kronen debt owed to the plaintiffs should be recovered by them in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of March and April, 1917 or October 1st, 1918, with interest at the rate of not less than five per cent. from said date.

Wherefore your petitioners pray that an appeal be allowed them in the above cause, that a citation be issued as provided by law and that the Clerk of the United States Circuit Court of Appeals for the Second Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by said petitioners may be reviewed and if error be found be corrected in accordance with the laws and customs of the United States.

Dated, New York, May 26, 1925.

Yours, &c., Stockton & Stockton, Solicitors for Petitioners,  
Office and P. O. Address, 2 Rector Street, Borough of Man-  
hattan, New York City.

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#### IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—May 26, 1925

Upon reading the petition of Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal,

David Forshay and Isaac Gutenstein, and on consideration of the Assignment of Errors presented therewith, it is

Ordered that the appeal as prayed for be and hereby is allowed and that a certified transcript of the record and proceeding be forthwith transmitted to the Supreme Court of the United States.

Henry Wade Rogers, Judge of Circuit Court of Appeals for the Second Circuit.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—May 26, 1925

Come now the plaintiffs, Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, Simon B. Blumenthal, David Forshay and Isaac Gutenstein, and file the following Assignments of Error upon which they will rely upon their appeal from the decree made by this Honorable Court on the 11th day of May, 1925, and say that this Honorable Court of Appeals for the Second Circuit erred as follows, to wit:

First. That the Court erred in reversing the decree of the District Court of the United States, for the Southern District of New York, entered June 24, 1924 and directing the dismissal of the bill of complaint herein.

Second. That the Court erred in holding that there had been no demand made by the plaintiffs for the repayment of the indebtedness owed them by the defendant Wiener Bank-Verein on August 6, 1919.

Third. That the Court erred in holding that plaintiffs cannot recover under Section 9 of the "Trading with the Enemy Act," unless the debt owing from the defendant to the plaintiffs was due and payable on October 1, 1917.

Fourth. That the Court erred in holding that until demand was made by plaintiffs, for the balance on deposit with defendant bank, said debt was not due and payable although it was owing to and owned by plaintiffs on October 6, 1917.

Fifth. That the Court erred in not holding that there is an account stated as of April 6, 1917, from defendant bank to plaintiffs.

Sixth. That the Court erred in not holding that there was a demand by reason of the notice of claim filed by plaintiffs with the Alien Property Custodian on March 25, 1919.

Seventh. That the Court erred in not holding that the contract of deposit was terminated and dissolved by the inception of the state of war between the United States and Austria Hungary.

Eighth. That the Court erred in not holding that the contract was terminated and dissolved by the international legal rule of non-intercourse between alien enemies, the test of alien enemy character being commercial domicile.

Ninth. That the Court erred in not holding that the contract of deposit was terminated and dissolved by the provisions of the Trading with the Enemy Act of the United States, forbidding intercourse with an "enemy" or "ally of enemy."

Tenth. That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States on or about April 6, 1917.

Eleventh. That the Court erred in not holding that the plaintiffs are entitled to interest on the amount of dollars specified in the 10th paragraph hereof at the rate of six per cent per annum from April 6, 1917.

Twelfth. That the Court erred in not holding that the kronen debt owing by defendant bank should be recovered by plaintiffs in dollars at the average cable transfer rate of exchange for United States dollars and Austrian kronen prevailing in the United States in or about the months of November and December, 1917.

Thirteenth. That the Court erred in not holding that plaintiffs are entitled to interest on the dollars specified in paragraph 12th hereof at the rate of five per cent per annum from April 7, 1917.

Wherefore the plaintiffs-appellant pray that said decree in said Circuit Court of Appeals be reversed and modified in the above respects, and in order that the foregoing Assignments of Error may be made a part of the record of plaintiffs-appellant present the same to said Circuit Court of Appeals and prays that such disposition may be made thereof as is in accordance with the Statutes of the United States in such manner made and provided, all of which is respectively submitted.

Stockton & Stockton, Solicitors for Plaintiffs-appellants, Office  
& P. O. Address, 2 Rector Street, Borough of Manhattan,  
City of New York.

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BOND ON APPEAL FOR \$250.00—Approved; omitted in printing

## IN UNITED STATES CIRCUIT COURT OF APPEALS

## CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 149 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Leopold Zimmerman, et al., Plaintiffs-Appellants, against Frederick W. Hicks, as Alien Property Custodian Frank White, as Treasurer, etc., and Wiener Bank-Verein, Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of June in the year of our Lord One Thousand Nine Hundred and twenty-five and the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin. (Seal United States Circuit Court of Appeals,  
Second Circuit.)

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CITATION—In usual form, showing service on Mannheim & Wachtel; filed May 28, 1925; omitted in printing

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## SUPREME COURT OF THE UNITED STATES

## STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF RECORD TO BE PRINTED WITH PROOF OF SERVICE—Filed Aug. 8, 1925

Pursuant to the Revised Rules of the Supreme Court of the United States, adopted June 8, 1925, and effective July 1, 1925, plaintiffs hereby make the following designation of the portions of the record to be printed in the transcript, and the following statement of points to be relied upon by them herein:

## I. Designation of portions of record to be printed:

- (1) That part of the record which was printed for use in the Circuit Court of Appeals for the Second Circuit.
- (2) Final decree of the Circuit Court of Appeals, dated May 11, 1925.
- (3) Opinion of the Circuit Court of Appeals.
- (4) Plaintiffs' petition for appeal.
- (5) Plaintiffs' assignments of error.
- (6) Order allowing plaintiffs' appeal.
- (7) Citation on appeal by plaintiffs.



II. Statement of points to be relied upon.

A. At common law plaintiffs are entitled to recover the Kronen deposit owed, calculated in dollars at:

1. The pre-war rate of exchange with interest, because:

1. There was an account stated;
2. There was a demand upon the Alien Property Custodian under the Trading with the Enemy Act in March, 1919;
3. The contract of deposit was terminated and dissolved by
  - a. The inception of a state of war between the United States and Austria-Hungary;
  - b. The international legal rule of non-intercourse between alien enemies;
  - c. The provisions of the Trading with the Enemy Act forbidding intercourse with an "enemy" or "ally of enemy."

II. The August 12, 1919, rate of exchange because the plaintiffs then demanded said sum of the defendant bank.

B. Under treaties plaintiffs are entitled to recover the Kronen deposit owed, calculated in dollars at the pre-war rate of exchange, together with interest thereon.

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To William R. Stansbury, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.

Manheim & Wachtel, Esqs., Solicitors for Wiener Bank Verein, 1328 Broadway, New York City.

Hon. Emory R. Buckner, U. S. Attorney, Solicitor for Defendants Frederick C. Hicks and Frank White, Post Office Building, New York City.

[File endorsement omitted.]

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Endorsed on cover: File No. 31351. U. S. Circuit Court of Appeals, Second Circuit. Term No. 628. Leopold Zimmermann, Louis J. Rees, Maryan H. Hauser, John S. Scully, et al., Appellants, vs. Frederick C. Hicks, as Alien Property Custodian of the United States; Frank White, as Treasurer of the United States; and the Wiener Bank-Verein, of Vienna, Austria. Filed July 24, 1925. File No. 31351.